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VOL 211

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 1
THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Audrey Austin, a Minor etc.,

Appellee

ERROR TO:
APPEAL FROM

vs.

Circuit

COURT

No. 29

October Term, 1917.

Williamson COUNTY

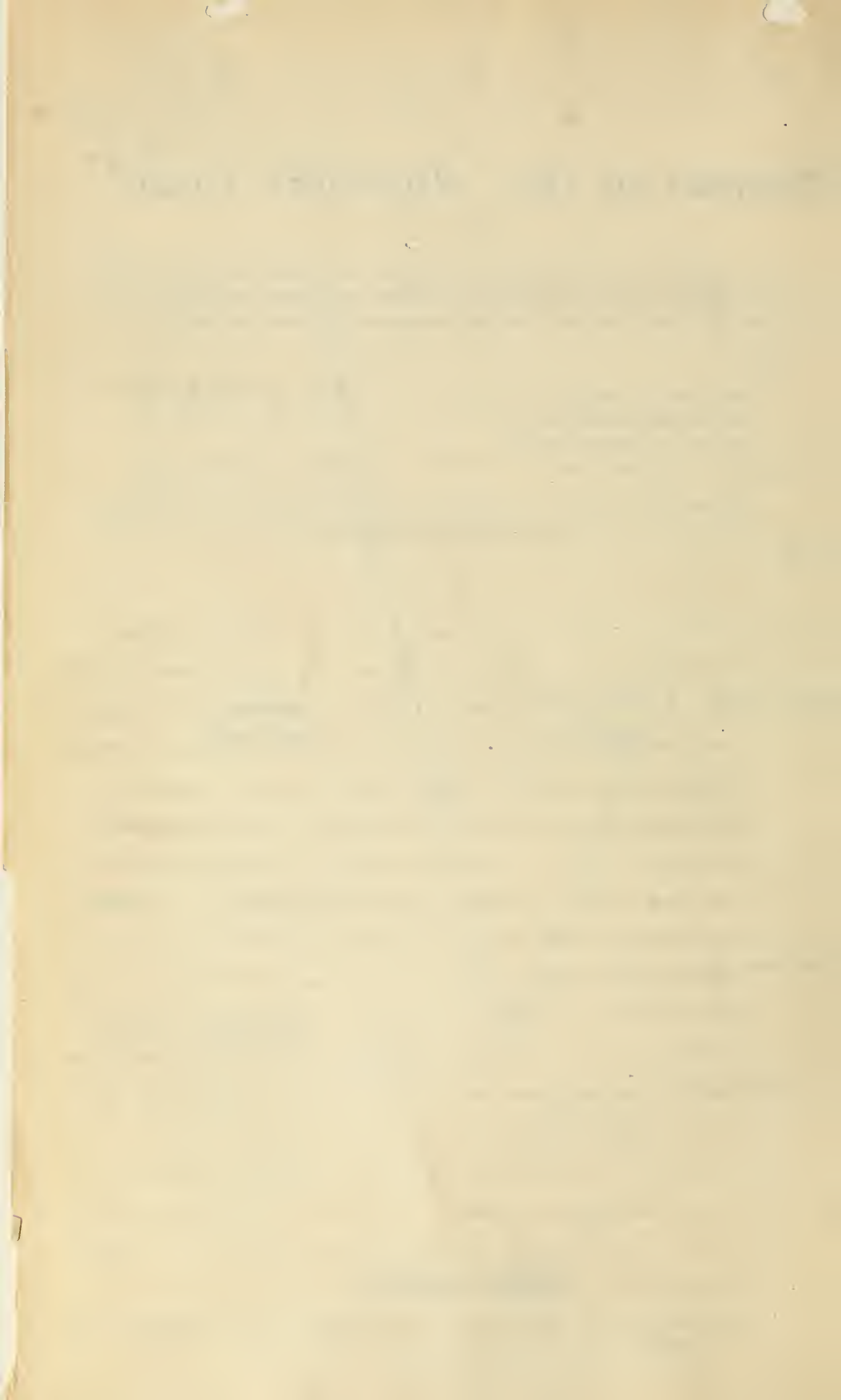
Nell Bass et al,

Appellants

No briefs filed
for appellee
4-1-18

TRIAL JUDGE

HON. W. O. POTTER



October Term, 1917.

Audrey Austin, a Minor, by her
next friend, Lora Austin,

Appellee

v.

Nell Bass and James C. Harris,

Appellants

Appeal from Williamson.

Opinion by Higbee, J.

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This is an action in case brought by appellee, Audrey Austin, by her next friend, Lora Austin against Nell Bass and James C. Harris, appellants, under section nine of the Dramshop Act of this state. The declaration originally consisted of five counts but at the close of appellee's evidence the court directed the jury to find appellants not guilty as to all counts except the second and third. The second count alleges in substance that on and prior to the twenty fourth day of June, 1916, Nell Bass, occupied a certain house located in Johnston City, Illinois, which she leased from the owner said James C. Harris; that she conducted therein a dramshop where intoxicating liquors in less quantities than one gallon were being sold and that the landlord Harris had knowledge of such fact; that on said date in said premises said Nell Bass, sold and gave to Robert Austin, the father of appellee, intoxicating liquors which he drank and which contributed in whole or in part to the intoxication of the said Robert Austin; that the said Nell Bass then and there drank intoxicating liquors with the said

Page 10 of 10

Robert Austin, becoming thereby herself intoxicated and by means of the intoxication of the said Robert Austin and the said Nell Bass, she, the said Nell Bass, shot and instantly killed said Robert Austin; that the said Robert Austin prior to his death earned the sum of \$1500 yearly; that he provided for himself and appellee and that by reason of his death she had been injured in her means of support to her damage in the amount of \$10,000. The third count is in effect the same as the second. Appellant filed a plea of the general issue and on a trial before a jury a verdict for \$1750 was returned in favor of appellee and judgment entered thereon.

Appellee has not filed any brief and the judgment could have been reversed and remanded pro forma but we have carefully examined the record and find this case arises from the same state of facts as those stated in the case of Lora Austin v. Nell Bass and James C. Harris, in which this court filed an opinion reversing and remanding, on June 18, 1917, the said Lora Austin the plaintiff in that case being the mother of appellee Audrey Austin and the widow of said Robert Austin, deceased. The facts as they appear from the record in this case are fully stated in that opinion and no good purpose could be subserved by repeating them here.

This court held in the former case that the sale, or any sale, made by Nell Bass to Austin could not be regarded as creating a liability where the act complained of was caused by the intoxication of Nell Bass and as the facts in this case are the same as in the former one, that holding must prevail here. It is urged that the court committed error in refusing to give certain of appellant's

instructions numbered one, two and three. These instructions one and three are almost identical in the language used with refused instruction number eight on the former trial, the refusal to give which was in that case held by this court to have been an error, and refused instruction two was in substance the same. Instruction No. 2 given in behalf of appellee in substance advised the jury that every child or other person who has been injured in person or property or means of support by any intoxicated person or in consequence of the intoxication of any person has a right of action against any person who has by selling or giving intoxicating liquors to such person, caused such intoxication in whole or in part, and that any person who was the owner of the building and knowingly permitted the sale of intoxicating liquors therein causing in whole or in part the intoxication of such person, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors as aforesaid, "for all damages sustained as a result of such selling or giving away of intoxicating liquors as aforesaid and for exemplary damages". It is a well settled doctrine in this state, as stated by this court in the opinion above referred to, that it must be shown in order to recover exemplary damages, the sale was made under aggravating circumstances on part of the parties selling or was wantonly or wilfully done. This instruction informed the jury that exemplary damages could be recovered by one injured in person, property or means of support, by proving the mere sale of intoxicating liquors to a person who becomes intoxicated if in consequence thereof the person suing was injured in his or her means of support, but does not advise the jury

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under what circumstances exemplary damages may be found and ignores the requirement that the proof must show the sale was made under aggravating circumstances on the part of the seller, or was wantonly or wilfully done.

In the opinion of this court above referred to we held it to be the well settled law of this state that it must be shown the sale was made under aggravating circumstances on the part of the seller or was wantonly or wilfully done, (citing Kellerman v. Arnold, 71 Ill.632). By that rule the instruction in question was plainly subject to criticism and should not have been given in the form in which it was presented. This case is so similar in every way and so interwoven with the case of Lora Austin against the same parties, supra that the opinion in that case must control the decision of this case. In that case the judgment of the trial court was reversed and the cause remanded and such must be the holding here.

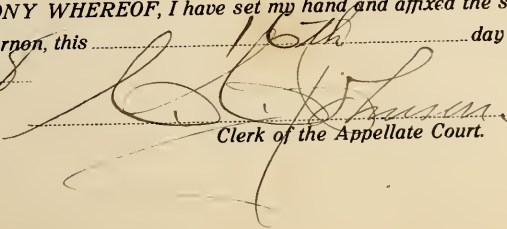
Reversed and remanded.

Not to be reported in full.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th day of April A. D. 1918


Clerk of the Appellate Court.

NOIN

4090

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 13

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Charles Pauly, et al,

Appellees

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 32

October Term, 1917.

Madison COUNTY

County of Madison,

Appellant

TRIAL JUDGE

HON. LOUIS BERNREUTER



October Term, 1917.

Charles Pauly and Edward)	
C. Pauly, Partners, Etc.,)	
)	
Appellees)	
)	
v.)	Appeal from Madison.
)	
County of Madison,)	
)	
Appellant)	

Opinion by Higbee, J.

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Appellees, who are the members of a firm of architects, brought this suit to recover compensation claimed to be due them for services rendered the county of Madison in the preparation of plans and specifications for a court house.

The case has been tried twice in the circuit court without a jury. The first trial resulted in a judgment against appellees, but on appeal to this court, that judgment was reversed and the cause remanded for a new trial in an opinion filed April 17, 1916 (reported as abstracted 199 Ill. App.225). Upon the second trial there was a judgment in favor of appellees for \$5062.50 from which the county has taken an appeal to this court. The facts are so fully stated in the former opinion filed by this court that it is unnecessary to repeat them here, especially as a careful examination of the record shows the facts in proof on this trial are substantially the same as in the first trial. The former opinion appears to have disposed of all the questions now raised by appellant.

October Term, 1917.

Charles Lewis and Lewis
vs. Lewis, Plaintiff.

Defendant.

v.

County of Madison,

Wisconsin.

Opinion by Justice, C.

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Plaintiff, who are the owners of a line of about-
 1000, amount this suit to recover compensation claimed to
 be due him for services rendered the owner of certain in
 the operation of said and operations for a short time.
 The suit has been filed herein in the circuit court
 under a writ. The first trial resulted in a judgment
 against plaintiff, but on appeal to this court, that judgment
 was reversed and the cause remanded for a new trial in all
 respects. Upon the second trial there was a judgment in
 favor of plaintiff for \$1000.00 with costs and costs. The
 cause was again on appeal to this court. The issue was in this
 regard to the extent of the services rendered by the plaintiff and it is
 necessary to report the facts, especially as a matter of
 fact, of the facts shown the facts in fact on this
 trial are substantially the same as in the first trial. The
 facts of this trial are as follows: It was shown that the plaintiff

It is urged however by appellant on this appeal that there could be no recovery on the part of appellees for the reason that the board of supervisors originally contemplated only the remodeling of a court house then in existence, that the first report of its building committee had that in view and that appellees were employed for the purpose of making plans and specifications to carry out this purpose, but that the plans and specifications prepared by appellees contemplated substantially a new structure at a cost largely in excess of that originally intended to be incurred. This question was fully discussed and passed upon in our former opinion, where it is said in concluding the review of the same, and referring to a resolution of the county board, "under this evidence it cannot be reasonably contended that appellants were in fault in submitting plans and specifications for a new building when they did so under the express direction of the committee, and where it further appeared that the committee acted in harmony with the will of the county board as expressed by the adoption of the resolution above mentioned." It is now further contended by appellants here that the plans and specifications prepared by appellee and submitted to the board of supervisors were not complete. This question also appears to have been fully disposed of in our former opinion in the following language: "The evidence discloses that complete plans and specifications were delivered to the building committee about the first of August, 1910 and presented to the county board at its regular meeting in that month, since which time such plans and specifications have remained in the possession of the county board. Our attention has not been called to any

[illegible]

objection, fault, criticism or other complaint then or at any time thereafter made to either the plans or specifications or to any disclaimer or denial of the right and authority of the committed to procure them." Even if this question had not been formerly disposed of the objection could not avail appellant here under the proof as it appears in this record. One architect produced as a witness by appellant, testified that they were incomplete, while another testified on behalf of appellees that they were as complete as it is customary to make such plans and specifications. The trial judge who heard these witnesses testify, had a better opportunity of judging of their credibility than this court and no sufficient reason appears why we should not concur in his finding upon that question.

It is another contention of appellant that appellees having declared upon a special contract in one count of the declaration, must recover upon the contract declared on or not at all and that they could not be permitted to recover under the common counts. In our former opinion it was said as could also be rightfully said here, "The evidence tends to show that appellants (now appellees) did everything they could in the performance of their contract and that full performance was prevented by the action of the county board." The doctrine is well established in this state that where an employer fails to perform his part of the contract for services, the employe is at liberty to acquiesce in an abandonment of the contract and may recover for services rendered under the common counts. *Anglo-Wyoming Oil Fields v. Miller*, 117 Ill.App.552; *Hess Co. v. Dawson*, 149 Ill.138; and this

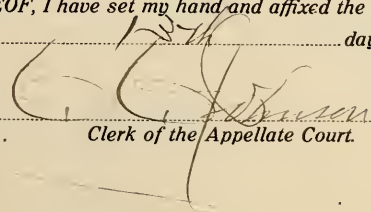
same doctrine is applied against a municipality in the case of City of Elgin v. Joslyn, 136 Ill.515, in which the doctrine is laid down that "where a party performs his contract in part and is prevented by the other party from finishing it he will have the legal right to abandon it or treat it as rescinded and sue and recover for the work and materials furnished by him". In accordance with the holdings of this court when this case was here on the former trial, the judgment of the court below should and will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 12th day of April, A. D. 1918.


Clerk of the Appellate Court.

NOIINI

4072

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 22

W. G. Nivins,
Appellee

~~ERROR TO~~
APPEAL FROM

vs.
No. 37
October Term, 1917.

Circuit COURT

Illinois Terminal Railroad Co.,
Appellant

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

October Term, 1917.

W. G. Hivins,)	
Appellee)	
v.)	Appeal from Madison.
Illinois Terminal Railroad Company)	
Appellant)	

Opinion by Higbee, J.

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The issues and facts in this case are the same in all their essential features as those in the case of Bettmer v. Illinois Terminal Railroad Company, decided at this term, though the land in this case is located about one mile nearer appellant's railroad embankment than the land in the Bettmer case, and the decision in that case must control in this cause.

In this case four special pleas were filed to the declaration. The first three are the same as the three special pleas in the Bettmer case. The fourth special plea in this suit avers that the crops, alleged in the declaration to have been damaged, were grown by appellee as a tenant subsequent to the building of the embankment and that appellee would have no right of action for such damages. This count^{ant} is based on the theory that the embankment in question was a lawful and permanent structure and that any damages occasioned thereby accrued when it was constructed, the measure of which would be the depreciation in market value of the land or lease hold injured thereby and for which

there could be but one recovery. This suit like the Bettner case and the case of Drda v. Illinois Terminal Railroad Company also decided at this term is a suit not for the recovery of damages resulting from the construction of the embankment in question but for the recovery of damages resulting from the alleged defective construction of the embankment in that it failed to provide sufficient outlets for the water. What was said by the court in the opinions filed in the Bettner and Drda cases upon that question must control in this suit.

The instructions complained of in this case are substantially the same as the instructions complained of in the Bettner and Drda cases and practically the same objections are urged. The holding of the court upon the instructions in those cases fully covers all complaints made of the instructions in this case. The contention of counsel that the verdict here is excessive is based upon the theory that none of the damages sustained by appellee as the result of the rains of 1916 were shown to have been caused by appellant's embankment. As said in the Bettner case where the facts were the same, this was a question of fact for the jury, and under the law and the facts in proof this court cannot disturb the finding of the jury in that respect.

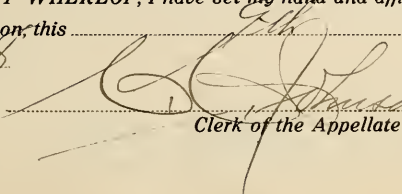
In accordance with the views of the court as expressed in the opinions filed at this term in the two cases above mentioned the judgment in this case should be and is affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 24th day of April A. D. 1918


Clerk of the Appellate Court.

NOINI

4093

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

C. W. Terry, Trustee,

Appellee

vs.

No. 39

October Term, 1917.

Banner Clay Works, et al,

Appellants

211 I.A. 23

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

THE HISTORY OF THE

REIGN OF

CHARLES

THE FIRST

OF

ENGLAND

BY

JOHN

WILKINS

ESQ.

October Term, 1917.

C. W. Terry, Trustee)	
v.)	
Banner Clay Works,)	
In the matter of C.A. Bartlett,)	
Receiver,)	Appeal from Madison.
Appellee)	
and)	
Edwardsville Home Trade Coal Co.,)	
E.A. Feller Co., B.J. Jeffress & Co.,)	
Objectors to Receiver's Report,)	
Appellants)	

Opinion by Higbee, J.

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At the March Term, 1914 of the Madison county circuit court C. W. Terry, filed a bill to foreclose a second mortgage, in which he was named as trustee for the bondholders, on the Banner Clay Works, for the sum of \$50,000. C. A. Gueltig and A. D. Powell, who were at that time, and have since continued to be partners of C. W. Terry, the trustee, in the practice of law under the firm name of Terry, Gueltig and Powell, filed the bill as solicitors for the trustee. After entry of appearance was filed by the Banner Clay Works, a decree of foreclosure was rendered against the property of the Clay Works named in the mortgage. In accordance with that decree the property was sold by the master in chancery, to A. D. Powell, a member of the firm of Terry, Gueltig and Powell and at the expiration of the period of redemption a deed was made to him as trustee

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1. *Journal of the American Medical Association*, 1964; 191: 1001-1002.

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for the second mortgage bondholders. On April 20, 1914, upon petition of C. W. Terry, trustee, filed in the foreclosure suit by Guelzig and Powell, his solicitors, the court appointed C. A. Bartlett, receiver of the Banner Clay Works with power and authority to operate and conduct the business. By stipulation filed in court the first mortgage bondholders waived their first lien and consented to the appointment of the receiver. In the order appointing the receiver, he was authorized to issue receiver's certificates in any sum not to exceed \$15,000, which were to be a first lien on the property.

May 23, 1914, the receiver filed an inventory showing the assets, liabilities and bills payable. Among such bills payable was one to Edwardsville Home Trade Coal Company for \$2,803.24, one to F.A. Keller Company for \$195.70 and one to A.J. Jeffress and Company for \$482.60, these being the parties who are the appellants here. The evidence shows these three items were for wares furnished prior to the filing of the bill for foreclosure, and were not in any way liens against the property involved. The property was sold to Powell for \$2616.16, less than the debt interest and costs, June 24, 1914 and on petition of C.W. Terry, trustee, a deficiency judgment for that amount in his favor and against the Banner Clay Works was entered, extended nunc pro tunc and execution awarded. June 16, 1914, the court approved a report of the receiver and directed him, out of any funds in his hands as such receiver, to pay himself the sum of \$1500 as fees for his services to date, and also out of such funds, to pay his attorneys, Terry, Guelzig and Powell the sum of \$1500 as fees for services rendered by them

to date. The record shows appellants had appeared in court and filed their claims before this order of court approving the receiver's report was entered. At the January term, 1916 of said circuit court the receiver filed his report showing that on account of bad market conditions he was not able to conduct the business with any profit and asking that he might be directed to sell all brick and all mortgaged property on hand; that out of the net proceeds of such sale he be directed to pay the receiver's certificates outstanding, together with all other claims against him as such receiver, and that any money remaining be paid out under the further order of the court. The cause was referred to the master in chancery to take the evidence and report his conclusions of law and fact. Appellants filed objections to certain items paid out by the receiver for which he had taken credit in the report and the master overruled the objections. Exceptions to the master's report were filed and upon hearing before the court these were overruled and a decree entered approving the master's report and ordering that appellants pay the costs made by the hearing on the objections, from which decree this appeal was taken. It appears to be the contention of appellants that their claims should be paid in full before any assets of the Banner Clay Works are applied in payment of the items objected to. In their argument counsel for appellants say "we ask that the decree be reversed and the objections be sustained to the receiver's report, and the receiver directed to pay the claims of these creditors out of the assets now in his possession as receiver of which, in the proper administration of affairs as receiver, he should now have in his possession."

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The claim of Edwardsville Home Trade Coal Company appears to consist of a note dated May 7, 1912 for \$1500 and interest thereon and a balance of \$1043.11 on an open account for coal furnished prior to the receivership; that of the H.A. Keller Company of an open account for goods sold prior to April 4, 1913, and that of A.J. Jeffress and Company of a note dated July 23, 1913 for \$482.60 and interest thereon. All these claims were unsecured and no attempt had been made to reduce them to judgment. The items in the receiver's report which seem to be objected to are: the items of \$1000 fees to Gueltig, and Powell, as solicitors for the trustee in the foreclosure, \$1500 as fees to Terry, Gueltig and Powell as solicitors for the receiver, \$200 to F.W. Luth for money advanced prior to the receivership, certain items to C.W. Meyer, Dr. J. Baron, F. Frohmeyer, and Dunlap Pippold Co. and also certain items for repairs. Aside from the question whether appellants being simply unsecured creditors, are in position to raise the question here sought to be raised, the decree of the court appears to be substantially correct.

The receiver issued approximately \$14000 worth of receiver's certificates, which were declared to be a first lien upon the property in the hands of the receiver. Conceding that the allowance of \$1500 to Terry, Gueltig and Powell as solicitors for the receiver were improper, yet the trustee is not contesting that allowance, and the deficiency judgment for \$2616.16 in his favor would more than absorb that amount. The evidence tends to show that the proceeds of the receivership will not be sufficient to pay the outstanding receiver's certificates and the deficiency

judgment, after paying the necessary costs of the receivership, aside from solicitor's fees. The evidence further shows that the fees, allowed Qualting and Lowell as solicitors for the trustee in the foreclosure suit were paid by the bondholders, who were the judgment creditors and also the purchasers of the mortgaged property. The propriety of the allowance of that fee, which was not paid out of any funds in the receivership, cannot be questioned here as it did not affect appellants' rights or result in any injury to them. The objection to the F. L. Luth item of \$200 is not well taken. It appears this money was advanced by Luth to meet the monthly payroll immediately prior to the receivership, and the receiver enjoyed the benefit of the labor for which that money paid. Claims for current expenses of the ordinary operation of the business incurred within a limited time before the receivership were proper charges against the receivership fund. 34 Cyc 356. It was no doubt upon this theory the trial court allowed and the receiver paid, appellant, Edwardsville Home Trade Coal Co., the sum of \$123 for coal furnished just prior to the receivership.

As to the Meyer, Baron, Frohmeyer and Dunlap-Kingdd items the evidence is not altogether clear. It appears, however, that at the time the bill to foreclose was filed, there was a large quantity of brick in the yard, either in the kilns or in separate piles. To each kiln or pile was attached a placard stating that such kiln or pile had been sold to one of the above mentioned parties, naming him, and each of them held a bill of sale for the brick sold him. Appellants claim there was an unpaid balance of \$710.20 due from Meyer ~~for~~ for the brick so purchased by him, a like

balance of \$912.08 from Baron, \$580 from Frohmeyer and \$456.20 from Dunlap-Dippold. These bills of sale were all issued prior to the receivership and some of the parties had given notes for a portion of the price paid, but the exact amount each one owed could not be determined until a recount of the brick was made. Appellants claim that neither the brick nor the different balances due, therefore were accounted for by the receiver. It does appear, however, that the price of brick having advanced, and the receiver, having orders to fill, under an agreement with these different parties sold the brick on their respective accounts, and that these parties or some of them agreed, if the receiver would pay the interest upon the notes they had given for the purchase price they would forego any profit. The Banner Clay Works had received the money on these notes by assigning the same prior to the receivership and the profits derived from this transaction were fully accounted for by the receiver. When the receiver assumed control of the business and property, he found these conditions and he was compelled to take the property as he found it. (Chicago Title & Trust Co. v. Smith, 168 Ill.417; Willam v. Huesbaum, 95 Ill.App.277) The items of interest paid by him in this transaction were properly allowed. No sufficient reason has been advanced why the items for "repairs and betterments" should not be allowed. It is true that the plant has not been operated since such repairs were made but they were made after the plant, as was customary, had been closed for the winter and it appears they would have been necessary had the plant been continued. They seem to have been made in good faith and

the receiver was properly given credit for them.

The evidence does not support the contention of appellant that Bartlett agreed to serve as receiver for a fee of \$822, that being the amount due him from the company for insurance premiums. The appointment of the receiver was ancillary to the foreclosure proceeding and was for the benefit of the parties thereto, and possibly other lien creditors and not for the benefit of the ordinary creditors, whose claims arose prior to the filing of the bill for foreclosure, (Young v. Clapp, 147 Ill.176).

The decree in this case should be and is affirmed.

Affirmed.

Not to be reported in full.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 5th day of April
A. D. 1918


Clerk of the Appellate Court.

NOION

neg 4095
Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W. A. Metcalf,

Appellee

vs.

No. 49

October Term, 1917.

Chicago Sandoval Coal Company,

Appellant

211 I.A. 31

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. JAMES C. MC BRIDE

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October Term, 1917.

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| W. A. Metcalf, |) | |
| Appellee |) | |
| v. |) | Appeal from Marion. |
| Chicago Sandoval Coal Company, |) | |
| Appellant |) | |

Opinion by Higbee, J.

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This is an action on the case brought by appellee to recover damages for personal injuries alleged to have been sustained by him on September 20, 1916 while working as dock boss for appellant at its mine at Sandoval, Illinois.

The declaration consisted of seven counts, each one alleging in substance that appellee was employed by appellant; that in the course of his employment it was his duty to inspect the coal as it was dumped from a basket on to a screen, for the purpose of detecting whether there was any sulphur or other impurities in the same; that it was the duty of appellant to furnish appellee with a reasonably safe place in which to work and that appellant not regarding its duty in that behalf, carelessly and negligently failed to provide appellee with a safe place in which to work in that it failed to properly protect appellee against flying particles of coal, and as a result thereof a particle of coal struck appellee in the right eye destroying his eyesight. Each count alleged appellant had filed with the industrial board its election not to provide and

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Paul C. Kiersey, Jr.

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— *Journal of the American Medical Association*, 1967, 201: 1000-1001.

pay compensation according to the provisions of the workmen's Compensation Act. The plea of general issue was filed, and upon trial before the court and a jury a verdict was returned for appellee in the sum of \$2000.

Counsel for both parties in their statements devote considerable space to stating in detail the evidence showing the construction of the tippie, basket and screen where appellee worked, and the manner of operating the same. This evidence is quite voluminous, but under the view of the case taken by this court it would be useless for the purpose of this opinion to repeat such evidence in detail here. There is no dispute as to the construction of the tippie, basket or screen, nor is it disputed that appellee was injured and as a consequence lost the sight of his right eye. Appellant offered no evidence on the trial but at the close of appellee's evidence requested the court to direct the jury to find appellant not guilty. Whereupon appellee, by leave of court, reopened his case and offered in evidence a certified copy of appellants notice, filed with the Industrial Board, of its election to reject the provisions of the Workmen's Compensation Act. While this certificate did not bear the seal of the Industrial Board, the court admitted it in evidence. No proof whatever was made as to the posting or service of the notice as required by section two of the Act. Appellant then renewed its motion for a peremptory instruction, which was again denied. Appellant insists that the trial court erred in holding it had jurisdiction of the cause and that its peremptory instruction should have been given. As this judgment must be reversed for other reasons and any informality of insufficiency of proof in

regard to the question whether appellant had rejected the provisions of the Workmen's Compensation Act, may be remedied on another trial, we need not discuss the question here.

On the trial appellee was permitted to prove, over the objection of appellant, that the screen could have been made more safe, if it had been protected by a fine wire, a screen or piece of sheet iron. The question for the jury was not whether the screen could have been made safer, but whether it was reasonably safe in the condition it then was. In the case of *Kennedy v. Chicago & Carterville Coal Co.*, 180 Ill.App.42 in an opinion touching a similar question, it was said "The question before the jury, however, was not as to whether other modes were safe or safer, but was the mode adopted reasonably safe and our Supreme Court has held it to be reversible error to show that a safer mode could have been adopted", citing *Brosman v. Drake Standard Machine Works*, 232 Ill.412, and *Casey v. Leedy Elevator Mfg.Co.*, 142 Ill.App.126. These cases are in point here and under their authorities it was reversible to admit this evidence.

The court at the request of appellee gave the following instruction to the jury, "The court instructs the jury that it is the duty of the defendant to furnish and provide the plaintiff with a suitable and reasonably safe place in which to perform the work and labor required of him; and if you find from a preponderance of the evidence in this case that the defendant failed and omitted to furnish the plaintiff with a reasonably safe place in which to work in the manner charged in the declaration, and by reason of its failure to so provide a reasonably safe place, if the evidence shows that it did fail, then the plaintiff

would be entitled to recover any damages that he might have sustained, if any have been shown by the evidence." By this instruction the jury are told in substance they should find for the appellee if they believe from a preponderance of the evidence that appellant had failed to furnish appellee a reasonably safe place in which to work. They are not told that such failure to provide a reasonably safe place to work must have contributed in some manner to appellee's injury. This instruction undertook to state conditions which would entitle appellee to recover a verdict in his favor, and as it wholly failed to require casual connection between appellee's injury and the negligence charged against appellant, it was erroneous. (Hurst v. Madison Coal Co., 201 Ill.App.205) The instruction was further defective in that it informed the jury that under the circumstances named appellee would be entitled to recover any damages that he might have sustained, if any had been shown by the evidence, without confining his damages to those stated in the declaration. This left the jury free to assess whatever damages they might think under the evidence, appellee had sustained, unguided by any legal rule of damages, and without limiting them to the damages charged in the declaration. Such instructions have been condemned by our courts of appeal. (Loggs v. Iowa Central Ry.Co., 187 Ill.App.621 and authorities there cited). This instruction also improperly stated the duty imposed by law upon appellant in informing the jury, "It is the duty of the defendant to furnish and provide the plaintiff with a suitable and reasonably safe place in which to perform the labor and work required of him", whereas under the authorities it was only appellant's duty to use reasonable care to provide him with a reasonably safe working place

(Collins v. Western Electric Co. 178 Ill.App.23) An examination of the record shows that this instruction was not cured by other instructions given.

For the reasons above given the judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

McBride, J., took no part on the hearing of this case.

Not to be reported in full.

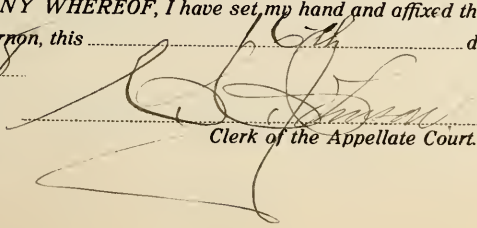
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of April
A. D. 191.....


Clerk of the Appellate Court.

NOINI

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 44

Frank Wadley,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

City COURT

No. 65

October Term, 1917.

East St. Louis COUNTY

Schwartz Brothers Express Co.,

Appellant

TRIAL JUDGE

HON. H. L. BROWNING



October Term, 1917.

Frank Wadley.

Appelles

γ.

Schwartz Brothers Express Company.

Appellant.

Appeal from City Court
of East St. Louis.

Opinion by Higbee, J.

— — — — —

Appellee Frank Wadley brought an action for damages against appellant Schwartz Brothers Express Company, to recover for injuries sustained by him November 27, 1916, in a public street in the city of East St. Louis, Illinois, which he claims were caused by the negligence of the servant of appellant.

There were two counts in the declaration but the second was taken from the jury by the court at the conclusion of plaintiff's evidence. The first count upon which the case went to the jury alleged that appellant on the day named was possessed of and operating a certain express and delivery business in and about the city of East St. Louis and in connection therewith certain teams, wagons and buggies were used which were under the control and management of its servants; that a certain servant of appellant named Henry Roy was in charge of one of its horses and buggies engaged in its business; that Roy carelessly and negligently drove and managed said horse over a public street in said city so as to cause

the same to run upon and against appellee who was then and there in the exercise of due care for his own safety and that by reason of such negligence on the part of said servant, appellee was then and there hurt, crushed, bruised and injured. The jury returned a verdict in favor of appellee in the sum of \$100 for which amount judgment was given against appellant and the latter has prosecuted an appeal to this court.

Appellant claims that the verdict is against the weight of the evidence and that the court erred in not directing a verdict in its favor and its argument in this court is devoted solely to the discussion of the questions of fact involved in the case. Broadway in the City of East St. Louis runs east and west and Main street north and south, and it was at the intersection of these two streets where the traffic is heavy that the injury occurred. Appellee, a man sixty six years of age, was at the time of the accident, in company with another man going from the southeast corner of the intersection of said two streets, diagonally across to the northwest corner. Roy, a servant of appellant was driving a horse and buggy belonging to the latter, east on Broadway, intending to turn north on Main street. It was conclusively shown that Roy was driving east on the north side of the street. Appellee, who was walking on the right side of his companion, looked up Broadway eastward for approaching vehicles, and as he reached a point some 10 or 12 feet from the sidewalk, and just as he turned his head to the west, he was knocked to the pavement by appellant's vehicle, both wheels passed over him, and he received the injuries for which he brought

suit. His companion, who was west of appellee, from which direction the vehicle was coming, saw the same just in time to escape injury, but was so near the vehicle that the wheels barely missed him. He called to appellee but the warning came too late to save the latter from injury. Not only was appellee's ^{anti} horse and buggy on the wrong side of the street, that is the north side going east but it was also proven by appellee's witnesses that the horse was being driven at a lively gait, one witness stating at the rate of eight miles per hour, while no evidence was offered by appellant as to the rate of speed at which the horse was going.

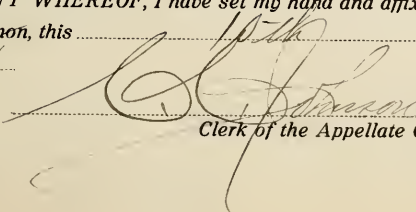
There was no material conflict in the evidence as to the circumstances surrounding appellee's injury. The questions of negligence on the part of appellant's servant and the exercise of due care on the part of appellee, were questions of fact for the jury and the proofs plainly showed a right of recovery in appellee. The judgment of the court below will therefore be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of
A. D. 191.....


Clerk of the Appellate Court.

NOIN



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 53

James Smith,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 73

October Term, 1917.

Saline COUNTY

Saline County Coal Company,

Appellant

TRIAL JUDGE

HON. A. W. LEWIS

October Term, 1917.

| | | |
|-----------------------------|---|---------------------|
| James Smith, |) | |
| |) | |
| Appellee |) | |
| |) | |
| v. |) | Appeal from Saline. |
| |) | |
| Saline County Coal Company, |) | |
| |) | |
| Appellant |) | |

Opinion by Higbee, J.

---oOo---

This is an action to recover damages for personal injuries sustained by appellee on June 22, 1916, while employed by appellant in one of its mines. On the trial before the court and a jury, a judgment for \$4000 was rendered in favor of appellee.

The declaration consisted of four counts. The first count alleges in substance that tracks were laid in the rooms of the mine over which loaded and empty cars were hauled by electric motors; that the track in room No. 33 off of the second east entry off of the second north entry on the east side of the mine, was in a dangerous condition in that the rails where they connected were so curved and bent as to be likely to cause cars passing over the same to be derailed; that on June 22, 1916, while appellee was operating an electric motor in pushing a car over this track in room No.3, the car, by reason of such dangerous condition of the track, was derailed and appellee's leg was broken and he was otherwise injured; that appellant negligently failed to maintain its said track in a reasonably safe condition, and because of such negligence appellee was injured. The second, third

doi:10.1017/S096382370000429

On 17th March 1941, the following was received from the
Director of the Home Office, London:

and fourth counts charged appellant with a violation of its duty under the Mining Act, to have the track examined by its mine examiner and to withhold appellee's entrance check until the track should be made safe. A plea of the general issue was filed.

The only evidence introduced by appellant was the testimony of its assistant superintendent, who stated that in a conversation immediately after the accident, appellee, told him that "after the car jumped it caused the car to kick up on the end of the motor and that he reached for the three-way switch and let it drop, causing the motor to make a second lunge and injured his leg", and also "that if it had not been ~~dxz~~ for dropping the switch he would not have been injured".

Counsel for appellant has argued only two assignments of error namely, that the declaration failed to state any cause of action, in that it does not allege that the injuries of appellee were caused by the negligence of appellant, and that it was error to give appellee's seventh instruction. While the declaration is not perhaps as definite and precise in its allegations that appellee was injured by appellant's negligence as it might have been, it does allege that because of the dangerous condition of the track the car was "derailed and the rear portion of the car was thrown up in the air and as a direct result thereof the front end of the motor upon which the plaintiff was riding and which he was then and there driving and propelling ran under and against the rear end of said car in such manner as to catch the right leg of plaintiff which was broken" etc. It is claimed by appellant that this language amounts only to a description of appellee's leg at the time the car was derailed

and not that the injury was the result of the matters stated. We think the declaration is not properly subject to this criticism but that the words used constitute a sufficient allegation that appellee's leg was broken by being caught between the car and motor, and not that it was at that time already broken.

The seventh instruction given in behalf of appellee is in the following language, "You are further instructed that if you believe from a preponderance of the evidence that the working place of the plaintiff was in fact dangerous in manner and particular charged in the declaration, eight hours before the time the men were permitted to enter the mine to work therein, then it was the further duty of the defendant company to have caused its mine examiner to have taken up the entrance check of the plaintiff and to have given the same to the mine manager, and to have caused the mine manager to have withheld the plaintiff's entrance checks from him, and to have prevented the plaintiff from entering his working place on said day to work therein except for the purpose of making the same safe, and if you find from the preponderance of the evidence that the defendant has wilfully failed to perform its duty in this regard, then your verdict must be for the plaintiff". The vice of this instruction is that it directs the jury to return a verdict for appellee, if the preponderance of the evidence showed appellant had violated its statutory duty but failed to require that appellee's injury should have been the result of appellant's said neglect of its statutory duty.

It is a fundamental principle of the law relating to actions for personal injuries that the injuries complained

and the fact that the company was not aware of the company's policy.

[illegible]

of must be the natural and proximate consequence of the negligence charged. This instruction entirely omits the essential qualification that the evidence must show that such failure on the part of appellant to perform its statutory duty, contributed to appellee's injury to entitle him to recover and the giving of it was reversible error.

(Hurst v. Madison Coal Corporation, 201 Ill.App.205;

C. & N.W.Ry.Co.v.Carroll 12 id.643.)

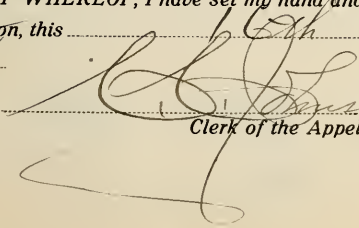
The judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of
A. D. 191.....


Clerk of the Appellate Court.

NOIN

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{22nd} ~~full~~ day of ~~And~~ ^{June} A. D. 1918, there was ^{refiled} ~~filed~~ in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 66

Robert L. Finley,

Appellee

~~ERROR TO~~

APPEAL FROM

vs.

Circuit

COURT

No. 77

October Term, 1917.

Randolph

COUNTY

Federal Life Insurance Company,

Appellant

TRIAL JUDGE

HON.

LOUIS BERNREUTER

October Term, 1917.

| | | |
|---------------------------------|---|-----------------------|
| Robert L. Finley, | } | |
| Appellee | | |
| v. | | Appeal from Randolph. |
| Federal Life Insurance Company, | | |
| Appellant | } | |

Opinion by Higbee, J.

---oGo---

The appellee, Robert L. Finley, recovered a judgment in the circuit court of Randolph county against appellant, the Federal Life Insurance Company for \$2500 on a policy of accident insurance, issued by that company to him, September 1, 1916, insuring him against loss resulting from "external, violent and purely accidental means".

The defense relied upon by appellant was that the injury was self inflicted and that certain answers made by appellee to material questions in the application for the insurance were not true.

It appears that appellee, a practicing physician residing at Evansville, Illinois, made application for insurance to appellant's Company, August 31, 1916; that a policy was issued to him September 1, 1916; that on September 11, 1916 while alone in his office about 12:30 P.M. he sustained an injury by being shot in the left leg just above the ankle joint necessitating the amputation of that limb about twelve inches below the knee. It is insisted by appellant that the burden was upon appellee to establish by a preponderance of the evidence the injury was effected solely, directly and

October Term, 1937

Robert E. Jones,
 Appellant
 v.
 Federal Life Insurance Company,
 Appellee

Declaratory Judgment

The appellant, Robert E. Jones, deceased a long-
 time in the circuit court of (county) county, Illinois, appellant,
 the Federal Life Insurance Company, the appellee, was a policy of
 accident insurance, issued by that company to him, which
 on July 1, 1936, insuring him against loss resulting from his
 death, violent and sudden accidental means.

He desired relief from the appellee and that the
 injury was not inflicted and that certain amounts due by
 appellee in certain matters in the application for the in-
 surance were correct.

It appears from evidence, a statement prepared
 by the appellant, Illinois, that application for in-
 surance was made by appellant, Jones, on July 1, 1936, and a policy
 was issued to him by appellee, Federal Life Insurance Company, Illinois, on August 1, 1936; that on September 1,
 1936 while alone in his office at Chicago, Illinois, he sustained
 an injury by being shot in the chest and that he died about five
 days thereafter and was buried in that city about five
 inches before the trial. It is stated by appellant that the
 burial was upon appellee's policy by a representative of
 the appellee the injury was effected while, directly and

independently of all other causes through external, violent and purely accidental means, and was not self inflicted. Also that appellee failed to establish such facts by a preponderance of the evidence and that it was error for the trial court to refuse appellant's peremptory instruction directing the jury to return a verdict in its favor. There were no eye witnesses to the accident save appellee and he testified positively that the accident was purely accidental and the injury was not self inflicted. Proof introduced by appellant tended to show appellee was in straightened financial circumstances and in need of money to settle a serious charge made against him by one Ullman Wierheim; that while appellee had no hunting license he borrowed the gun a few days before the accident stating he intended to go squirrel hunting during the noon hour.

While it is true the burden of proof was upon appellee to show the injury was accidental and not self inflicted yet he had the right to invoke the presumption that men do not ordinarily take their own lives or inflict injury upon themselves. "The presumption of the law is that all men are sane and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self destruction and to cast upon the defendant company the burden of producing evidence on the point". *Fidelity and Casualty Co. v. Weise*, 132 Ill. 496; *Wilkinson v. Aetna Life Ins. Co.*, 240 id. 205. While this presumption is not conclusive and may be overcome by proof yet when to it is added appellee's testimony, the evidence was sufficient to

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require the court to submit to the jury the question whether the injury was "effected solely, directly and independently of all other causes though external, violent and purely accidental means" or was self inflicted; and under the proof in the record this court cannot say that the verdict of the jury in this respect was so manifestly against the weight of the evidence that it should be set aside. There were certain questions in the application which it is insisted by appellant were material, and the answers to which are claimed to have been warranties or material representations. These answers are said by appellant to have been false and it contends that by reason of such falsity the policy was null and void. They were as follows:

"10. "What are your average monthly earnings?"

Ans. "200".

"19. Are your habits of life correct and temperate?"

Ans. "Yes."

There were sixteen instructions given in the case, one in behalf of appellee and fifteen in behalf of appellant. All the instructions in the case on the question of what answers are warranties or representations of such material facts that their falsity will render the policy void, in cases of this nature, were given in behalf of appellant, so that it cannot be heard on this appeal to complain that the jury was improperly instructed on that question. The only evidence introduced by appellant in any way tending to show that appellee at the time of making application for the insurance did not have a monthly income of \$200, was that at the time of the trial he was the owner of no real estate, had not to exceed \$50 in cash and his personal property was worth not to exceed \$400.

relative the court has decided in that way the question whether
the subject was a married woman, it being an independent
of all other cases, though somewhat, similar and nearly so-
cietal matter of the same kind, and in the year 18
and hence this court cannot say that the subject of the 1877
is that subject was so completely decided the subject of the
subject that it should be the same. There is no reason
questions as to the subject, which is a matter of appeal
but some material, and the subject is not the same as
have been mentioned by the subject of the subject. There
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subject. They were as follows:

1st. Was the subject of the subject of the subject of the subject?
And, 2nd.

3rd. Was the subject of the subject of the subject of the subject?
And, 4th.

There were three questions of law in the case,
one in regard to the subject of the subject of the subject of the subject,
all the questions in the case of the subject of the subject of the subject
subject and subject of the subject of the subject of the subject of the subject
from that point of view, the subject of the subject of the subject of the subject
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that it cannot be said that the subject of the subject of the subject of the subject
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Considerable testimony was offered by both parties upon the question whether appellee's habits of life were "correct and temperate". This evidence was conflicting but as the jury were properly instructed on this question and the facts upon the whole tended to sustain their finding, that finding should not be disturbed. It is also urged by appellant that the court erred in not permitting it to introduce proof that appellee on two different occasions had made improper proposals to women patients of his. One of these occasions was a few months and the other several years before he made application for the insurance. We are of opinion the proffered proof has not material bearing upon the issues in the case and that the court did not err in rejecting it.

The following is the only instruction given the jury in behalf of appellee:

"The court instructs the jury that if you believe from the evidence that the Federal Life Insurance Company issued the policy sued on and that said policy was based upon the application endorsed thereon and that the answers to the questions in said application by Doctor Finley were true at the time they were made and that Doctor Finley has lost his left foot by accident as charged in the declaration then your verdict should be for the plaintiff".

Appellant urges that this instruction is erroneous in that the question of appellee's habits was confined to what such habits were on August 31, 1916 the day he made application for insurance. A fair consideration of this instruction will not sustain so strict an interpretation of it. The jury could not have understood from this instruction that they were to pass upon appellee's habits only on that day. Furthermore in four of appellant's instructions the habits of appellee were referred to as "at the time the application for the policy was made". These words in effect are the same as those complained of in appellee's

instructions. Even if appellee's instruction was erroneous in that respect appellant could not raise that question for the reason that a party has no right to complain of an error in an instruction when a like error appears in an instruction given at his own request". (C. & A.R.R.Co.v.Harrington, 192 Ill.9; Brennan v. Carterville Coal Co., 241 id.610.) It is also urged this instruction is erroneous because it assumes that an accident happened. This objection is not well taken as the instruction expressly tells the jury that to entitle appellee to recover they must believe "from the evidence" certain things among them that appellee "lost his left foot by accident as charged in the declaration". It is also insisted that the court erred in modifying appellant's instructions one, three, four, five and fourteen. It is sufficient answer to this claim to say that an examination of the record fails to disclose that any of the instructions presented by appellant were modified by the Court.

Appellant also urges as further reasons for the reversal of the judgment in this case that it was error for the court to give certain other instructions offered by it. Even though such instructions were erroneous, appellant cannot take advantage of such error. A party cannot complain of an instruction that the court gives upon his own request (Judy v. Judy, 261 Ill.470; C. & A.R.R.Co.v.Kelly, 182 id.267; C.P. & St.L.Ry.Co.v. Leah, 152 id.249).

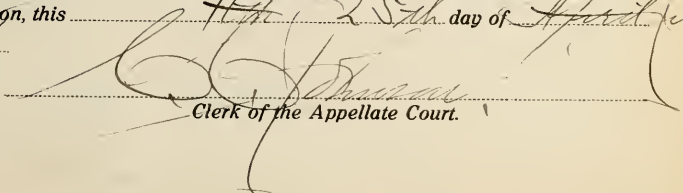
The facts tend to support the verdict, no reversible error appears in the record and the judgment will therefore be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 11th 25th day of June A. D. 1912


Clerk of the Appellate Court.

NOIN

eng'd dated 4/22/18) 4103

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{22nd} ~~first~~ day of ^{June} ~~April~~, A. D. 1918, there was ^{refiled} ~~filed~~ in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 68

Silas Williams, Admr.,
Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 3
October Term, 1917.

Jefferson COUNTY

Mt. Vernon Car Mfg. Co.,
Appellant

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 3.

In the Appellate Court,

Agenda No. 3

Fourth District.

October Term, A. D. 1917.

Silas Williams, Administrator
of the estate of Willie Williams,
deceased,

Appellee.

vs.

Mt. Vernon Car Manufacturing Company,
Appellant.

}
}
}
}
} Appeal from the Cir-
cuit Court of Jeffer-
son County.

McBride, J.

Upon a trial had in the Circuit Court of Jeffer-
son County judgment was rendered in favor of appellee and
against appellant for five thousand dollars and costs, which
it is sought to reverse by this appeal.

The appellant is a corporation engaged in the
business of manufacturing and repairing of cars at Mt. Vernon,
Illinois, and the appellee's intestate at the time of the
injury and death was engaged at the work of lining cars with
paper.

It appears from the evidence that the injury and
death of appellee's intestate occurred on January 8, 1913,
and that the appellant was not at that time operating under
the compensation act of 1911, which was then in force.

The plant of the appellant is located near Mt. Ver-
non, Illinois, covers a large area of ground. The work of
constructing cars is divided into several different apart-
ments, one of which is what is known as the steel plant in
which the steel car frames are built; another is the mill
building and still another is what is called the set-up

James E. Lee
In the presence of
George E. Lee
October 10, 1911

Witnessed by
at the office of
Notary Public,
Chicago, Ill.

Witnessed by
at the office of
Notary Public,
Chicago, Ill.

Witnessed by

When a deed is in the custody of a
notary public, it is subject to the
control of the notary public and
it is subject to the control of the
notary public.

The notary public is a person who
is authorized to receive and
record deeds and other
instruments, and the notary public
is subject to the control of the
notary public.

It appears from the evidence that the
notary public is a person who
is authorized to receive and
record deeds and other
instruments, and the notary public
is subject to the control of the
notary public.

The deed of the notary public is
subject to the control of the
notary public, and the notary public
is subject to the control of the
notary public, and the notary public
is subject to the control of the
notary public.

shop, in which the injury in question occurred, and lies directly west of the mill building. This set-up shop is about sixty feet wide and three hundred fifty feet long and within its inclosure are three railroad tracks, commonly called North track, middle track and South track, and they are so arranged that the frames of cars are pushed in from the west on to these tracks for completion and each track is of sufficient length to hold about eight cars with spaces of three to six feet between each of them.

When the cars were completed engines were pushed in from the west coupled the cars together and pulled them out to another part of the yard, and this was called "pulling the track," and at such times it appears that warnings were usually given by the sounding of the whistle upon the engine, ringing of the bell and by men running up and down the sides of the cars giving notice that they were about to "pull the track." South of this set-up shop was what is called the paper house and to the east of that is a paint shed, and still east of that are other shops. The south side of the set-up shop building was practically open, large open spaces at short intervals. At the north west corner of the appellant's premises the switch tracks connect with the L. & N. Railroad Company tracks. When the cars were standing upon the tracks in the set-up shop for completion there would be spaces of from three to six feet between the cars, left for the purpose of permitting the men while engaged at work to pass in between the cars. There were about two hundred fifty men engaged in work in each of these apartments. On the day in question the deceased, Willie Williams, was engaged in the finishing up of the inside of the cars and he and Albert Williams were working together on

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a car located on the middle track and at about 11:30 o'clock in the morning he went to the paper house south of the shop to procure some rolls of paper to be used in the lining of the car. He secured two rolls of paper and as he was returning, carrying a roll of paper under each arm, as he attempted to pass between the third and fourth cars on the south track he was caught between the cars and killed.

It is claimed by appellee that the engine was pushed in on this south track and hooked on to these cars while the deceased was down at the paper house and that he knew nothing of the engine being there.

Appellant claims that the engine was in plain view of the deceased at the time he passed in between the two cars. The custom was to attach the engine to the first car and then to the second and afterwards to the third and so on and it is claimed by appellant that the usual course was pursued at this time and that the usual warning was given before the engine was attached to any of the cars and as it pushed back from car to car. As to what occurred at that time and the manner of pushing the engine and coupling up the cars the evidence is somewhat conflicting.

This case was heard at a former term of this court and the cause reversed and remanded because of the giving of improper instructions. Another trial was had in the Circuit Court and judgment was again rendered for the plaintiff, to reverse which this appeal is prosecuted.

It is contended by appellant that the declaration was not sufficient upon which to render a judgment for the reason, as it alleges, that it fails to aver that the deceased did not know the cars were being coupled together, and does not set forth the duties required to be performed

by the deceased, and that it fails to state the duty of the defendant. We do not believe these points are well taken; the declaration, as we read it, does aver that it was the duty of the defendant to use reasonable care in the operation of its engine in and about the hauling of the cars along the tracks so as to avoid injury to the employees of said defendant who might be crossing said tracks, and then avers that the defendant negligently and carelessly operated the said engine by negligently and carelessly driving or propelling the same over and along the said railroad track and against the first of said cars then and there standing on said track, with such force as to violently push and move said cars and cause the same to crash together with great force and violence without first giving reasonable warning of their intention so to do. The former part of the declaration also sets forth the duties in which the deceased was engaged, and then avers that while the deceased was crossing the said track in the discharge of his duties as a liner he was caught and crushed between said cars. We believe that the necessary elements to constitute a good cause of action were set forth in the declaration and would be good especially after verdict. *Vogrin vs. The American Steel & Wire Co.*, 263 Ill., 474.

It is further insisted by appellant that it does not appear from the evidence in this case that the defendant was guilty of the negligence charged, and while it is not denied that the engine was pushed back against the cars and caused the several cars upon that track to be coupled up, and that in so coupling them the deceased was caught between the third and fourth cars and crushed; but insists

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that the cars were moved in the usual manner for moving cars and that the deceased was duly warned of their movement. It is true that the evidence tends to show that two or three persons ran along the side of the cars hallooing to all to look out that they were about to couple up the cars on that track and "pull the track" as they termed it, and there was some evidence tending to show that one of the witnesses saw the deceased about to pass between the cars and warned him not to come and that he hesitated and then moved on. It is also claimed that the bell upon the engine was ringing and that the whistle blew several blasts before commencing to couple up the cars. If further appears from the evidence that there was a great deal of noise in and about the place where this occurred. That there were about two hundred fifty men engaged at work, some hammering iron, others nailing and many of them engaged in different pursuits, all of which were more or less noisy, which cause apparently an immense amount of noise at this place. The deceased was engaged as a liner of cars and was at work upon a car on the middle track when it became necessary for him to leave his place of work and go down to a supply shop, about fifty yards distant, for some paper and so far as appears from the evidence the blasts of the whistle and the men running up and down the track may have occurred while the deceased was at the supply shop and before his return to the track and that he knew nothing thereof; and as to the warning that it is claimed to have been given to him personally it appears that he was about to pass between the third and fourth cars when one of the witnesses halloosed at him, that he hesitated and then passed on and it does not appear, and no one can know, whether he understood and appreciated the warning that

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given. If the defendant was guilty of negligence in failing to give proper warning before the deceased started in between the cars, as the jury found it did, then the defendant could not excuse itself by saying it gave warning at the moment the deceased was in peril without showing that he understood that warning and that it was given under such circumstances as he could have escaped from the impending danger. Appellant recognized that before attempting to couple these cars together, on account of the number of men engaged at work upon them that it was necessary to give some kind of warning but no particular system of warning had been adopted. As the evidence shows, sometimes they would blow one or two blasts of the whistle, at other times four or five blasts and at other times they would ring the bell; but at this time the engineer was unable to tell how many blasts of the whistle he blew, and the witnesses differ as to the number and some of the witnesses who were present and close to the cars heard the blasts of the whistle and others did not but with all the noise and confusion that existed in this set-up shop it is, in our judgment, a question of fact for the jury to determine whether or not sufficient warning was given before attempting to couple up the cars. It is quite clear that if appellant had caused some one to have been at the end of the car before it was started to couple with the following car and after that coupling was made then passed on to the end of the other car and made a coupling that there would have been no danger of any one being injured by reason of passing between the cars while engaged at their work. A distance of from three to six feet was left between these cars for the purpose of per-

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mitting the men to pass between the cars in the discharge of their duties in this shop and we think that the deceased was at the time in the discharge of his duty as liner. These were all questions of fact to be determined by the jury under the conditions as they there existed and we are not able to say that the finding of the jury was manifestly against the weight of the evidence.

It is next insisted that the deceased was not in the exercise of due care for his own safety, and that being true there could be no liability upon the part of the defendant and that the Compensation Act of 1913 repealed the Compensation Act of 1911, and that by such repeal the common law defenses of contributory negligence, assumption of risk and negligence of a fellow servant were in force as at common law and that this principle was ignored throughout the trial and that the case was tried upon the theory that appellant was denied these defenses, except so far as the negligence of the deceased contributed to the injury, so far as it operated to mitigate the damages. We do not so understand the effect of the Compensation Act of 1913. While it is true that it does repeal the Act of 1911, yet Section 32 of the Act of 1913 provides that, "No right of action for damages at common law or under any other statute existing at the time of the taking effect of this Act shall be affected by this Act". And in addition to this, this right is preserved by Section 4 of Chapter 131 with reference to the construction of statutes. This also disposes of the criticism made by counsel for appellant upon the refusal and modification of its instructions 1, 2 and 3, as these instructions as presented ignore the rights of appellee under the Compensation law of 1911, and we think the court did right in the refusal

...the ... of the ...

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of instruction 1, and modification of instructions 2 and 3 as was done. Instruction 4 given on behalf of the plaintiff is also criticised for the reason that it does not provide that the negligence of the defendant, if any was proven, so far as the same contributed to the injury, should be considered in reducing the amount of damages. It is true that this instruction omits to state that the contributory negligence of the deceased, if any, should be considered in reducing the amount of damages. This instruction, however, did not direct a verdict, and instruction 1 given on behalf of the plaintiff did provide, "But in the event the jury find from the evidence that his death was proximately caused by his own contributory negligence then they must consider such contributory negligence in reducing such amount of damages they will allow in event they do allow damages." These instructions must be considered as a series, and when so considered it appears to us that the jury was reasonably informed that such contributory negligence would go in the mitigation of any damages they might allow, and this doctrine and these instructions are fully sustained by the case of Crooks vs. Tazewell Coal Co., 263 Ill., 343.

It is further objected that some of plaintiff's instructions were given in the language of the statute. While this may not always be the proper thing to do yet it has been recognized frequently by our courts as not being reversible error, and we can not say that that is true in this case. Other criticisms are made upon instructions which we do not deem sufficiently important to require consideration.

It is also insisted that improper remarks were made by counsel for plaintiff in their argument to the jury.. This criticism cannot be considered for the reason that the remarks as made were not preserved in the bill of exceptions.

The first of these is the fact that the
 Government has not yet decided whether
 it will accept the offer of the
 Government of the United Kingdom
 to purchase the ship. The second
 is the fact that the Government
 has not yet decided whether it
 will accept the offer of the
 Government of the United Kingdom
 to purchase the ship. The third
 is the fact that the Government
 has not yet decided whether it
 will accept the offer of the
 Government of the United Kingdom
 to purchase the ship.

It is true they were included in the affidavit upon a motion for a new trial but this is not sufficient to bring them within the bill of exceptions. If counsel desire to preserve remarks they must be taken down and certified to by the Judge as having been made by counsel but in this case the only evidence preserved is by affidavit of the parties that such statements were made but this is not endorsed by the court in the bill of exceptions. This question has been fully settled in the case of Crown Coal & Tow Co. vs. Taylor, 184 Ill., 250. C. & N. W. R. Co. vs. Finnan, 84 App., 383.

After a careful consideration of this case we are unable to say that the verdict of the jury was manifestly against the weight of the evidence or that the court committed any reversible error in this proceeding and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

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Since the filing of the opinion in this case a petition for a rehearing has been presented, in which petition our attention is called to the case of *The People vs. King* 276 Ill. 138, in connection with the assignment of error touching the remarks alleged to have been made by counsel for appellee in their closing argument. We have examined this case and find that it is not applicable to this case for the reason that in this case the remarks alleged to have been made by appellee's counsel are not only not certified to by the trial judge, but are not even sworn to so that it can clearly be seen that it does not come within the reasoning of *The People vs. King*, *supra*.

The complaint made in the petition for a rehearing as to the giving of instruction No. 6 for appellee for the reason that it omitted the word "willful" is urged in the petition for rehearing for the first time, and was not presented in the brief and argument filed in this cause. It has been held both by the Supreme and Appellate Courts of this state that a new point cannot be made for the first time on a petition for rehearing, *Gaines vs. Williams*, 146 Ill. 450; *Davis vs. Gibson*, 70 Ill.App.273; *Barthaler vs. Druiding & Kersten*, 58 Ill.App.336.

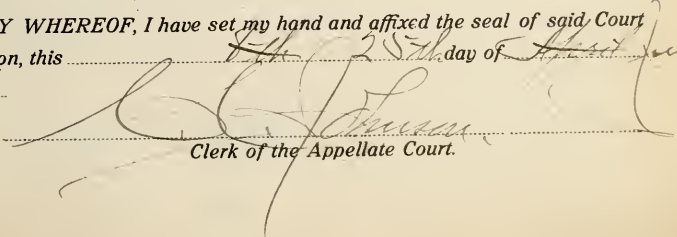
The remaining points urged in the petition were fully considered by us in the preparation of the foregoing opinion.

Petition for rehearing denied.

Opinion modified by the Court June 22, 1918

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 25th day of August A. D. 1918


Clerk of the Appellate Court.



21105

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 80

Barney Childers,
Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 13

October Term, 1917.

Franklin COUNTY

Chicago, Wilmington & Franklin
Coal Company,
Appellant

TRIAL JUDGE

HON. JULIUS C. KERN

Term No. 13.

In the Appellate Court,
Fourth District.

Agenda No. 28

October Term, A. D. 1917.

Barney Childers,
Appellee.

vs.

Chicago, Wilmington & Franklin
Coal Company, a Corporation.
Appellant.

}
}
} Appeal from Circuit Court
of Franklin County.

McBride, J.

It is sought by this appeal to reverse a judgment of \$475.00 recovered by the appellee against the appellant in the Franklin County Circuit Court.

It appears from the record in this case that on and prior to October 7, 1915, the appellant was engaged in the business of operating a coal mine in or near the village of Orient in Franklin County. That the mine consisted of a perpendicular shaft with the usual underground rooms, entries and roadways and employed therein a large number of men. The coal was hauled from the rooms to the uplifting shaft by means of a motor and the appellee was employed as a trip rider in said mine and upon the motor so used. On October 7, aforesaid there was a car loaded with coal in room No. 10 off the first stub entry off the main west entry off of the south entry to which the motorman and appellee as trip rider attached the motor for the purpose of hauling said loaded car to the hoisting shaft. It appears that before the motor was driven into said room No. 10, that the trip rider ran ahead and examined the room to see if there

103

Chicago, Illinois 60604
 Carl O'Donnell, a partner
 1901/101

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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were any danger marks or ~~marks~~^{marks} of dangerous conditions existing in the room and found none and then the motor was backed in to the room to hitch on to this car and as they were about to make the connection the trip rider was compelled to run around a timber that was set by the side of the track and used for the purpose of supporting the roof and, as he testifies, that just as he past around the timber a chunk of coal about three feet long and six inches thick fell upon him, struck him upon the head, left shoulder and eye and injured him. He was taken to the bottom by the motorman and cared for by a physician according to whose statements the appellee was not very much injured.

Counsel for appellant in its argument insists that the evidence in this case is not sufficient to warrant a verdict under either count of the declaration. It is stipulated that the appellant was not operating its shaft under the compensation act.

The first additional count of the declaration is a common law count and charges that on October 7, 1915, "It was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to perform his work but that defendant disregarded its duty in that respect and carelessly and negligently allowed Room 10 aforesaid to be and remain in an unsafe and dangerous condition for the performance of the work which the plaintiff as a trip rider was then required to do, in that the defendant allowed and permitted a large amount of loose coal and rock to be and remain in the roof of room 10.....; and which was liable to fall upon and injure the employees of the defendant among whom was the plaintiff, while passing in and out of the room, which unsafe

and dangerous condition was well known by the defendant or by the exercise of due care and caution on its part could have been ascertained". The second additional count, after stating the general conditions as in the first count, alleges that a dangerous condition existed in the roof of said room within eight hours of the time before plaintiff entered the mine, in this, that said coal and slate were in a loose condition in the roof of said room and likely to fall upon and injure the plaintiff while in the performance of his duties and that the defendant wilfully failed to have its mine examiner inspect said room and observe whether there were any dangerous conditions in said room and wilfully failed as evidence of an examination of said room to inscribe on the walls thereof the month and day of the month of his visit, and wilfully failed to place a conspicuous mark at the place where the dangerous place existed, and failed to observe that there was a dangerous condition in said room, and wilfully failed to make a record thereof and have the mine examiner take in to his possession the entrance check of the plaintiff, and wilfully failed by its mine examiner to submit to the mine manager any report indicating a dangerous condition in said room, and wilfully failed by its mine manager to withhold the entrance check of the plaintiff and to instruct the plaintiff not to work in such place until such dangerous condition had been removed, as provided by statute.

It will be observed that in both counts of the declaration it is charged that a dangerous condition existed in the roof of room 10, in this, that the coal was loose and liable to fall. The only witness introduced on behalf of the appellee for the purpose of sustaining this declaration was the testimony of the appellee himself, who says that he

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made an examination of room 10 that morning before making this trip for the purpose of ascertaining whether there were any marks there; said he was looking for marks and then described how the marks would be made for gas and other ^{dangerous} conditions, and then states that there were no danger marks inside of room 10. He further testifies that after that the motorman came on back and coupled on to a car load of coal in room 10 and that, "There was a timber to this side of the track that is to hold the top of the coal from falling and I could not get on the rear end of the car and I had to run around these timbers and the motorman of the cars was about ten feet ahead of me. I was going to catch the rear end and the slab of coal fell on me from the roof of the room, about twenty feet from the entry. It was about three feet long and six inches thick and I do not remember how wide it was. It struck me on the head, left shoulder and eye". While the appellee says that a slab of coal fell and struck him on the head yet he does not testify that this coal was loose or had any appearance of being loose prior to the time of the fall. The only evidence that we have been able to find in this record of a loose condition of the coal in the roof of this room prior to the accident was the fact of the accident itself and this is not sufficient to warrant a finding of appellant's negligence under the first additional count or a wilful failure to observe a dangerous condition under the second additional count. The mere proof of the accident or injury does not shift the burden of proof on the master and require him to show that the injury did not result from his negligence. *Wabash Railroad Co. vs. Farrell* -- 79 App., 508; *Sack vs. Dolase et al*, 137 Ill. 129.

Under the duties as set out in the first additional count the master doesnot become an insurer that the place where he sets his men at work shall be absolutely safe. It is said by Justice Dibell in the case of Dougherty vs. Spring Valley Coal Company, decided by the Appellate Court of the Second District on February 10, 1917, that, "An employer does not become an insurer that the place where he sets his men to work shall be absolutely safe". From Hess vs. Rosenthal, 160 Ill., 621 to Donk Bros. Coal & Coke Co. vs. Thil, 228 Ill., 233 there are many cases where our Supreme Court followed the rule laid down in Cooley on Torts and Wharton on Negligence as held that the duty which the employer owes to the employe in that respect is to exercise reasonable care to see that the place furnished for the servant to work in is reasonably safe. The appellee does not pretend in the testimony offered by him that a dangerous condition existed in the roof of this room other than the mere fact of the accident. It xxx does appear from the testimony of the mine examiner that he examined this roof with his rod and lantern at about three o'clock that morning and that no loose or dangerous condition existed at that time. The mine manager testifies that he was in the room about fifteen minutes after the accident and examined it and could see no place from which the coal had fallen and that there was no coal on the floor. Bartlett testifies that in the afternoon he examined the roof of the room and found it smooth and that there was no place in the roof from which slate, coal or rock had fallen. Peter Mike and Edward Price both testified that after the accident they examined the roof of the room and that there was no place in the roof from which coal, slate or rock had fallen, and they all agree that the roof

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA, in its decision in the case of *United States v. Smith*, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 9

of the room was smooth and certainly if a block of coal three feet long and six inches thick had fallen out of the roof of this room they would have been able to have discovered it, and we must conclude not only that the plaintiff failed to show that a dangerous place existed before the accident but it has been abundantly shown by the appellee that no such condition did exist. The appellant certainly could not be charged with a wilful failure to ascertain that a dangerous condition existed unless there was something existing, some flaw or defect of some kind, that afterwards proved to have been dangerous. It is true as contended by appellee that if abnormal conditions existed that might or might not be dangerous, and they were or could have been observed by the mine examiner and afterwards proved to be dangerous that then a different rule would apply but this rule invoked by appellee would not in our judgment make the appellant liable where there was no appearance of a defect shown to have existed. Justice Dibell in the case of Dougherty vs. Spring Valley Coal Company, supra where a wilful failure to ascertain that a dangerous condition existed was charged further said in that opinion, "There is a substantial absence of any evidence that a dangerous condition existed there, except the fact, if it be a fact, that rock from the roof did fall. The condition of the roof of an entry is liable to constant change and the condition which resulted in the fall of the main entry, if rock from its roof did fall upon appellee, may have been produced long after the examination made during the preceding night, we therefore conclude that the evidence does not support the

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verdict and that the case must be tried again". Even conceding that appellee was injured in the manner he claims, we are of the opinion that the evidence wholly fails to show that a dangerous condition did exist in the roof of that room at the time of and prior to his alleged injury, and that the verdict and judgment is not supported by the evidence in this record, and the judgment of the lower Court is reversed and the cause remanded.

REVERSED AND REMANDED.

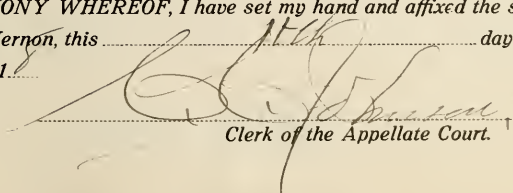
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in this regard, and the judgment of the lower court is affirmed and the cause remanded.

...and it was not until the late 19th century that the first ...

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court,
at Mt. Vernon, this day of
A. D. 191.....


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Homer E. Bailey,

Plaintiff in Error

vs.

No. 14

October Term, 1917.

Mary Niebruegge, Executrix, etc.,

Defendant in Error

ERROR TO

~~APPEAL FROM~~

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 14.

In the Appellate Court,
Fourth District.

Agenda No. 45.

October Term, A. D. 1917.

Homer A. Bailey,
Plaintiff in error.

vs.

Mary Niebruegge, executrix of the
last will and testament of Herman
Niebruegge, deceased,
Defendant in error.

}
}
} Error to the Circuit
Court of Madison
County, Illinois.

McBride, J.

Upon a trial of this case in the Circuit Court judgment was rendered in favor of the defendant in error, hereinafter called defendant, against the plaintiff in error, hereinafter called plaintiff, for costs of suit.

Prior to June 13, 1913, the deceased, Herman Niebruegge had for several years been afflicted with a nervous trouble. He had been treated by the local physicians for several years and also a specialist from St. Louis had attended and prescribed for him but they were unable to cure him. A few days prior to June 13th a man by the name of C. Kellerman, who was a professor in one of the schools at Troy, Illinois, visited the defendant and told her and the family of some trouble with which he had been afflicted and that he had been treated by Doctor Bailey, the plaintiff, and had been cured and recommended that they secure the doctor's services for the deceased. This conversation occurred in the latter part of the week and on Sunday following the conversation Dr. Bailey and his son, Walter A. Bailey,

October 20, 1955
Federal District
San Francisco, Calif.

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who was also a physician, came out to the home of defendant at Troy, Illinois, and arrived there at about ten o'clock in the morning. He said he came by the direction of Kellerman for the purpose of seeing deceased but the defendant claims that she told him they had already expended a great amount of money in treatment and it had done no good and they did not care to expend any more money unless they were sure of a cure, and claims that she refused to allow him to treat the patient. She says that he told her he had heard a good deal about the patient from Professor Kellerman and asked if she would permit him to see the patient; she told him he could and he went in and examined the patient and claims he gave patient a treatment. His son, Dr. Walter Bailey, was with him at the time. After the treatment the two doctors and the defendant and her two daughters had a conversation while upon the porch at which time defendant claims that she told the doctor she did not care to expend any more money on deceased unless she was absolutely sure he could cure him and that Doctor Bailey assured them he could cure him and that he would do so in three weeks and possibly in two weeks but that they would have to send him to a hospital in St. Louis, and they also claim at that time the defendant asked the doctor what his charges would be and he said not to talk about money matters until after he had effected a cure, and that the charges then would be reasonable. This is denied by Doctor Bailey and his son, and it is claimed by them that the defendant requested him to come over to Troy and see the patient, make arrangements to take him and treat him and that he was to do the best he could for him; that he gave no assurance whatever. Kellerman testifies

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that he was authorized by the family to send Doctor Bailey over to see the deceased. This, however, is denied by the family. On the next day the deceased was taken to the Baptist hospital in St. Louis, Missouri, by the direction of Doctor Bailey and he then began the treatment of him and continued the treatments for five weeks. It appears from a preponderance of the evidence that the deceased gradually grew worse under the treatment and that he became very nervous, much more so than he had been, and was at times unable to recognize his friends. This is denied by the doctor and the nurse. At the expiration of five weeks the defendant wanted to take the deceased to his home but the doctor advised her that it would not be safe to move him in his present condition. She then caused her local physician to go over and examine the deceased and see if he was in a fit condition to be moved home, which was done, and the doctor advised his removal, which was made immediately. After the patient had been removed Doctor Bailey made another trip to Troy, Illinois, to see how deceased was getting along. It further appears that after the deceased was taken to his home he became some better and was able to go about but died on or about the month of September 1915. It further appears that a few days after this removal that the plaintiff sent the defendant a bill for \$970.00 for treatment, which the defendant declined to pay. There was some effort made to compromise the matter but none effected, so the doctor then brought suit for the amount of his bill.

It further appears from the evidence that the plaintiff had no license to practice medicine in the State of Illinois.

It is contended by counsel for plaintiff that under the evidence in this case he is entitled to recover upon

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the merits and that the verdict of the jury is manifestly against the weight of the evidence. Also that the court erred in the giving of its instructions and in its rulings upon the admissibility of evidence.

As we view the case, the crucial question, and the one which will finally determine the issues involved, is as to whether or not the defendant had a contract with the plaintiff that he was to cure the deceased. The evidence upon this question was very conflicting, so much so that it was necessary, for a proper determination of the rights of the parties, that the jury be correctly instructed. If the jury had been correctly instructed we would not be disposed to disturb the verdict but as we view it one of the instructions given for defendant was erroneous, so much so, as to necessitate a reversal of the case.

The first instruction given by the court on behalf of the defendant was as follows, "The court instructs the jury that while the plaintiff has the right to testify in this suit in his own behalf the jury have the right in determining how much credit should be given to his testimony to take in to consideration the fact that he is the plaintiff and interested in the result of the suit". Owing to the fact that the testimony was so highly contradictory and that the witnesses for the defendant as well as the plaintiff were interested in the result of the suit, we think that this instruction was erroneous. It was calculated to impress the jury with the thought that the court entertained some special reason for discrediting the testimony of the plaintiff, which did not apply to the testimony of defendant. The instruction should have been of a character that made it

The parties and their witnesses of the party is necessary
against the weight of the evidence. With this the court
viewed in the light of the testimony and in the evidence
from the testimony of witnesses.

As we view the case, the witness testimony, and the
one which all directly testimony and testimony, it is
no matter as to the balance of the testimony, it is
evident that it is in favor of the witness. The witness
upon this question was very convincing, as much as that
it was necessary, for a proper consideration of the rights
of the parties, that the party be properly instructed. It
was that has been correctly instructed on this point. It is
evident to find the witness was in fact in favor of the
instruction given. The instruction was erroneous, as shown by
it is necessary a reversal of the case.

The first instruction given by the court in the
of the defendant was the witness, "The court instructs the
jury that while the plaintiff has the right to testify in
this case in his own behalf the jury have the right to take
into account the fact that the witness is his testimony
is not in his favor. The fact that he is his witness
and is not interested in the result of the case. The jury
the fact that the testimony was in fact in favor of the
that the defendant for the defendant as well as the witness.
It was instructed in the case of the witness, as shown
that this instruction was erroneous. It was necessary to
show the jury as the court that the witness testimony
was essential to the testimony of the defendant. It was
evident, and the jury as the testimony of the defendant.
The instruction should have been in a different form and it

applicable to the witnesses of plaintiff and defendant. An instruction similar to this one was condemned as erroneous in the case of Mangster vs. Hatch, 134 App., 340. It is true that an instruction similar to this was sustained in the case of C. & M. L. H. H. vs. Burridge, 211 Ill., 9, but that was upon the ground that one of the parties to the suit was a corporation and the court says, "If, in the instruction now under consideration, the words, 'the plaintiff' had been stricken out wherever they occurred and the words 'a party' substituted, the instruction would have been entirely unobjectionable, and yet the jury would have known that it could apply to none except the plaintiff, for the reason that he is the only party to the suit who testified. Under such circumstances the fact that he was identified by the instruction did not justify its refusal". The defendant testified in this case as well as the plaintiff and the same rule should have been applied to her testimony that was applied to the plaintiff.

It is also insisted by counsel for plaintiff that even if the evidence did show an agreement upon the part of the plaintiff to cure the deceased before he was entitled to pay, that he was notwithstanding entitled to pay for the first trip that he made to see the deceased and before the deceased was sent to the hospital. If the defendant did not authorize the plaintiff to call and see the deceased or if the plaintiff was not permitted under the laws of Illinois to practice medicine in this State, then either of these propositions would defeat a recovery. The court, however, gave an instruction for the defendant that unless the plaintiff held a license issued under the State Board of Health

of Illinois authorizing him to practice medicine in the State of Illinois, that he could not recover for the services rendered. It is contended that this was error because the plaintiff was not engaged in general practice in Illinois but merely examined the patient and diagnosed his case for the purpose of determining what effect if any his removal to the hospital for final treatment would have upon him, and cites in support of this contention the case of *Veigler vs. Ill.T. & S. Bank*, 245 Ill., 187. We do not regard this case as decisive of the question here involved. The decision there arose under a contract by which *Veigler* who was a practicing physician in Illinois had contracted with *Mrs. McVicker* in Illinois to go with her to California and wait upon her and care for her under a special contract. Our statute provides that, "No person shall hereafter begin the practicing of medicine or any of the branches thereof or midwifery in this state without first applying for and obtaining a license from the State Board of Health to do so". Sec. 2 of Chap. 91, Revised Statutes. And later on, the Legislature in defining what was meant by the practice of medicine says, "Any person shall be regarded as practicing medicine within the meaning of this Act who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another". Sec. 7 of same Chapter. The object of this statute was to prevent persons, who were not qualified, from practicing medicine upon the citizens of this State, and the statute is certainly broad enough to cover the visit made by *Doctor Bailey* for which he now seeks to recover a fee. The fact that he was seeking to collect a fee for a professional visit shows that he was engaged in the practice in Illinois.

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It has been determined by the Supreme Court of this state that persons who practice the profession of osteopathy, a cure by means of manipulation, are within the terms of this Act and require a license. People vs. Gordon, 194 Ill., 560. The plaintiff was certainly pretending to be able to cure the affliction of the deceased by his method of treatment and when he placed himself in that position it was necessary that he should possess a license to practice medicine under the laws of the State of Illinois. People vs. Dunn, 255 Ill., 289.

It is also insisted by counsel for plaintiff that the court erred in refusing to permit Walter Bailey to testify in the case. The Court refused this testimony because it appeared to it that Walter Bailey was interested in the suit. It was admitted upon an examination of this witness that the stationery and letter-heads and the bill rendered had at the head thereof the names of Doctor Homer A. Bailey, Doctor Walter A. Bailey and Doctor Arminia Bailey, and that the bill was rendered, "Mr. Herman Niebruegge, Troy, Ill., to Doctors Bailey & Bailey, Dr. Osteopathic physicians"; then follows a statement of the bill. And the evidence also shows that Doctor Walter Bailey gave a portion of the treatments to the deceased, and while it is true Doctor Walter Bailey testified that he had no interest in the result of this suit yet the evidence and circumstances were such as to warrant the court in concluding that he did have an interest in it. Merely because Doctor Bailey stated that he had no interest in the result of the suit would not require the court to believe him if from the circumstances and the evidence before him he thought he was not stating the

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facts correctly. A court is not bound to accept the testimony of a witness as true merely because there is no direct testimony contradicting it. If it contains such inherent improbabilities or contradictions as alone, or in connection with other circumstances in evidence, satisfy them of its falsity. *Podolski vs. Stone*, 186 Ill., 540. We are not able to say that the court erred in refusing to permit Doctor Bailey to testify but it does appear that the matters concerning which he was inquired about, except the treatment at the hospital and the condition of the patient while there, were all testified to by Walter Bailey later on in the case so we do not think there was any error committed in this ruling of the court.

Other errors have been assigned but we do not regard them as of such importance as to require further consideration, as we believe that the court did not materially err in the trial of this case, except as above stated.

We are of the opinion that the jury were not fairly instructed as to the credit to be given to the plaintiff by the jury and that the jury could infer from the instruction that the court had some specific reason why particular attention should be given to his interest in the case over that of the other witnesses. On account of the giving of the erroneous instruction above quoted we are of the opinion that the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

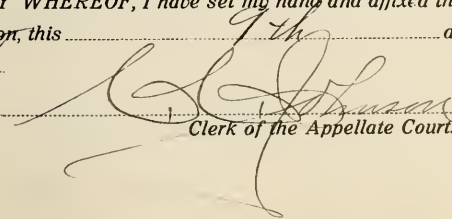
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th day of April A. D. 1918


Clerk of the Appellate Court.



Filed 6/22/18 4108

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

211 I.A. 91

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John Hiller, Sr., Admr.,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 19
March
Term, 1917.

Madison COUNTY

Mt. Olive & Staunton Coal Co.,

Appellant

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 19.

In the Appellate Court,

Agenda No.29.

Fourth District.

March Term, 1917.

John Miller, Sr., Administrator of)
Frederick Miller, deceased,)
Appellee.)

vs.

Mt. Olive & Staunton Coal Company,)
Appellant.)

) Appeal from the Circuit
) Court of Madison
) County, Illinois.

McCrider, J.

This appeal is prosecuted by appellant coal Company to reverse a judgment in favor of appellee rendered by the Circuit Court of Madison County.

The declaration consists of one count charging that appellee's intestate was employed as a driver in appellant's mine, hauling coal from the place where mined to the bottom of the shaft, and that appellant, "Wilfully, wantonly and negligently permitted a dangerous defect to exist in the roof of the roadway over which intestate was required to pass as such driver in hauling coal to the bottom of the shaft, in that the roof and the cross-bar which supported the roof at that point, where said Frederick Miller was injured, was too low to permit the driver upon a loaded box to pass under it with reasonable safety, which fact was known to the defendant, or should have been known to it by the exercise of reasonable care". That intestate was killed by coming in contact with said cross-bar while hauling a loaded box of coal along said roadway.

The evidence discloses that the roadway in question runs in a southerly direction from the parting where loaded boxes were left. It was intestate's duty to take empty cars from this parting south to the place where coal was being mined and to bring the loaded boxes back north to the parting. There were no eye witnesses to the injury which resulted in his death. The evidence shows that appellee's intestate was coming north with two loaded boxes of coal. Another driver who was some distance north of him heard him call "whoa" to his mule and came down to where he was to see what was the matter. He found intestate under the front car dead and the mule standing unhitched from the car a few feet further north. There was evidence tending to show that the body had been dragged along the track for some feet but the evidence, however, was contradictory as to the distance. About twenty or twenty-five feet south of where the body was found three iron bars had been placed against the roof as supports, extending across the tracks and supported by posts on each side of the roadway. These bars had been placed there some four or five years prior to the injury. In this roadway the roof had a general clearance of about six feet but at the place where the bars were placed it was somewhat lower, there being a clearance of about five feet and six inches between the top surface of the track and the bottom surface of the cross-bars.

Appellee's theory of the case is that the deceased met his death by striking his head on the rail or bar supporting the roof or that he was knocked from his seat by so striking his head and was thrown under the car. This theory is supported by circumstantial evidence of finding a few hairs on the cross-bar which witnesses for appellee testified

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were like the hair of deceased, and from finding a bruised place on the side of the head of the deceased, and as the evidence of appellee tended to show that the body had been dragged from near the cross-bars to where it was lying when found.

Counsel agree that the declaration in this case charges an action for negligence at common law.

The appellant has assigned many errors but the only ones argued are that the declaration did not state a cause of action nor did the evidence prove a case of negligence against appellant and that the court erred in not directing a verdict for the defendant, and in not sustaining its motion in arrest of judgment. This presents for our determination the single question as to whether or not the facts disclosed by the record are sufficient to warrant the jury in finding that the defendant was guilty of negligence in failing to furnish the deceased with a reasonably safe place in which to perform his work. The evidence is certainly sufficient to sustain the jury in finding that the deceased came to his death by his head having come in contact with the cross bar in the roof while he was engaged in driving a mule attached to a pit car loaded with coal which was then being hauled to a parting in the mine.

The appellant had elected not to operate its mine under the compensation act and no question of that character, or contributory negligence or assumption of risk can arise.

It is the contention of appellant that as these iron bars were placed there to prevent the roof from falling and that as it was shown to have been done in a workman like

manner, that as a matter of law it could not constitute a dangerous defect. Much reliance is placed by counsel for appellant upon the case of Jacobs vs. Madison Coal Corporation, 165 Ill. App., 444. In fact this is the only case cited in their brief. We do not regard this case as susceptible of the construction sought to be given to it by counsel. The declaration in that case charges that on account of a bad roof a number of cross-bars had been placed in the roof of the entry to support it and that a number of cross-bars had become broken and sagged and constituted a dangerous condition under the mining statute and that defendant willfully permitted plaintiff to enter the mine before such dangerous condition had been removed. The court in determining that case held that, "No such liability as that alleged in the declaration existed by statute and the declaration did not aver a cause of action". The court then, after having reached this conclusion, and after having determined that the case would have to be reversed, proceeded to discuss other errors and in the discussion decided that the deceased did not come to his death by coming in contact with the cross-bars. It is true at the conclusion the court says, "It is not a dangerous condition within the meaning of the statute to have a low entry or an entry lower at one point than another". We regard this language as being applicable to entries in general, but that the language used did not apply to an abrupt drop in the roof where the remainder of it was smooth and level. The case of Jones & Adams Co. vs. George, 227 Ill., 64, was a common law action for injuries received by reason of a sagging roof in the entry, and the action was sustained. So that if it be conceded as determined by the Jacobs case that an action for a

[illegible]

sagged roof was not within the terms of the mining law, the Jones & Adams case in commenting upon the facts with reference to appellee's negligence says, "It is to be noted that the entry was dark, and that the only way anything could be seen in it was by means of artificial lights". While this cause was reversed for errors in the admission of testimony the whole case when read clearly shows that the questions of negligence and assumed risk were matters to be determined by the jury under all of the facts and circumstances proven in the case. The evidence in the case now under consideration tends to show that the entry at the place of the injury was dark and no way of observing these cross-bars except by the light carried in the cap of deceased, which gave but little light, and the cross-bars could not be seen until deceased was right at them; the nearest light was in the parting ninety feet or more away; the roof was level up to this abrupt set-off; no light by which it could be seen, nothing to advise a trip rider of the approach to this obstruction. It seems to us that unless the trip rider noted the place of this obstruction and kept it in mind that he was liable to be struck by the cross-bars at any time. The appellant knew the height of the entry, the distance between the seat on the car and the cross-bars, that the entry was dark, and knew or should have known that appellee would be liable to be injured while passing under these bars, and knowing this should have provided some means by which the driver could see or know when he was approaching the cross-bars. The appellant failed to provide anything or any means by which these cross-bars could be located in the making of a trip. While it does appear that deceased was found several feet from the cross-bar, it is shown that he and other riders were in the habit of riding sideways upon their

[illegible]

seats, that the seat was three feet from the bars of the roof, that deceased had a bruise upon the side of his head, and hair of color of his was found upon the cross-bar, and that there was evidence tending to show he had been struck very near the cross-bar. When all of these facts and circumstances are considered it cannot, in our judgment, be said that the verdict of the jury was manifestly against the weight of the evidence.

We do not believe that under the existing conditions that it could be said as a matter of law that the place was reasonable safe. "Whether appellant was guilty of negligence of the deceased of contributory negligence were questions of fact for the jury". C. & A. vs. Eaton, 194 Ill., 444. It was for the jury to determine if the obstruction was of sufficient height to permit the trip riders to pass under in safety, or that suitable means had been provided to determine when these cross-bars were being approached. In commenting upon the question as to whether a railroad bridge was constructed of sufficient height for safety to the brakemen, the Supreme Court said, "The real question for the jury was, whether the bridge, as constructed, was safe, and not dangerous. It might be lower than other bridges and at the same time be safe. If the bridge, as constructed, was of sufficient height so that brakemen on the top of the car might cross over the bridge in safety, then it made no difference whether it was higher or lower than other bridges." C. & St. L. Ry. Co. vs. Walter, 147 Ill., 64. We are of the opinion that the question as to whether or not the place was reasonable safe for the deceased in performing his work was a question of fact for the

very near the present day. The fact of the existence of the same in the present day is a very strong evidence of the antiquity of the same. The fact of the existence of the same in the present day is a very strong evidence of the antiquity of the same. The fact of the existence of the same in the present day is a very strong evidence of the antiquity of the same.

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jury and not of law for the court, and we are unable to say that the verdict of the jury is manifestly against the weight of the evidence, and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

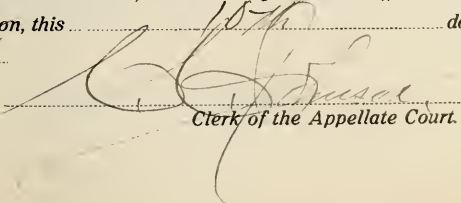
Not to be reported in full.

of the village, and the treatment of the people is

NOTA

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of A. D. 191.....


Clerk of the Appellate Court.

NOINI



4109

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 93

Continental Portland Cement Co.,

Appellant

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 33

October Term, 1917.

Madison COUNTY

John W. Koch et al,

Appellees

TRIAL JUDGE

HON.

J. F. GILLHAM

Term No. 33.

In the Appellate Court,

Agenda No.27.

Fourth District.

October Term, A. D. 1917.

Continental Portland Cement
Company,

Appellant.

vs.

John W. Koch, George E. Foster,
Henrietta W. E. Koch, Marie C. Joesting,
Alton Savings Bank and Citizens National
Bank,

Appellee

} Appeal from the
Circuit Court of
Madison County.

McBride, J.

The appellant filed a bill in chancery to set aside an alleged transfer of real estate and 430 shares of the capital stock in the Stoneware Pipe Company alleged to have been made by John W. Koch to his wife in fraud of his creditors. Upon a hearing of the case it was decreed that the alleged conveyance of real estate and transfer of personal property were made in good faith, and the court denied relief to the appellant as to these matters.

It appears from the record in this case that about the month of March 1912 John W. Koch was the owner of 430 shares of capital stock of the Stoneware Pipe Company, and at about that time he made a gift of and transferred the said shares of stock to his wife, Henrietta Koch, and endorsed and delivered the certificate to her. The evidence further tends to show that at that time John W. Koch was solvent and that the shares were transferred and given to his wife in lieu of making a will which he had promised her he would do.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILL.
JANUARY 1960

THE UNIVERSITY OF CHICAGO
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CHICAGO, ILL. 60637

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a copy of the original letter, and is signed by Abraham Lincoln.

108

John H. Smith, George W. Smith,
Lester A. Smith, John L. Smith,
L. C. Smith, and William Smith
Sons,

2. 471. 19

The following items will be charged to you:

It appears that the lowest in this class is about

the month of March 1915 when it was the owner of 500
shares of capital stock of the above named corporation, and
at about that time he was a gift of and transferred the
said shares of stock to his wife, Elizabeth Ford, and she
thereafter owned and retained the certificate in her. The witness
further says it was not at that time that it was
collected and that the shares were transferred and given to
his wife in lieu of making a will which he had promised
her he would do.

It further appears from the record that on March 10, 1914, John W. Koch became indebted to appellant to the amount of \$3155.46 and on that date signed a note, due ninety days after date, as surety for the Builders Supply & Coal Company to appellant. That on May 25, 1914, he executed as surety aforesaid another note to appellant for \$4500.00, due sixty days after date. It further appears that these notes were signed by both George M. Foster and John W. Koch, and that they were both stock holders in the Builders Supply & Coal Company. That the makers of said notes failed to pay the same when they became due and the appellant obtained judgment against the makers for \$7805.42, being the amount of the two notes above referred to. Execution was issued and returned "no property found".

It further appears from the evidence that John W. Koch was the owner of lots three and four, block twenty-nine of the City of Alton, of the value of seven to eight thousand dollars. That on the 13th day of July, 1914, he sold and conveyed the said real estate to his wife Henrietta M. Koch for an expressed consideration of one dollar but in fact for the consideration of one hundred shares of the capital stock of the Continental Portland Cement Company, being one hundred shares of the four hundred thirty shares that he had given to her in 1912, and valued at seven thousand dollars. Later on he borrowed five thousand dollars from the Alton Banking & Trust Company and secured the same by the one hundred shares of capital stock of the Stoneware Pipe Company and five thousand dollars worth of stock of the Chicago Lumber & Coal Company.

It further appears from the evidence that in 1911 Koch and Foster were owing the Alton Savings Bank five hundred

It further appears from the record that on May 17, 1911, John F. Cook became indebted in amount to the amount of \$110.00 and on that date signed a note, the date of said note, as shown by the notation appearing in the record, is as follows: "That on May 17, 1911, at Reading, Pennsylvania, I executed and delivered to the said John F. Cook, a certain note in the amount of one hundred and ten dollars, to wit: \$110.00, being the amount of the two notes above referred to. Transaction was made and returned for property loan."

It further appears from the evidence that from the time the record of said note and loan, filed January 19, 1912, at the City of Reading, in the name of John F. Cook, was filed and docketed, that on the 17th day of May, 1911, the said Cook conveyed the said real estate to his wife, Elizabeth F. Cook, for no expressed consideration of any kind and in full for the consideration of the unpaid balance of the capital stock of the International Reading Company, which was bonded bonds of the said company and which had been given to her in full, and valued at seven hundred and fifty dollars. It is to be observed that the same from the time making a short account was received from her by the said Elizabeth F. Cook, which stock of the company the company has the following balance sheet of assets of the said company (which is a full account):

It further appears from the evidence that in 1911 Cook and later receiving the same were five hundred

dollars, and that later on, some time in 1913 or '14, they borrowed several amounts of money from this bank, making a total of \$7,500.00 for which a note was given, and to assist in securing this note Henrietta Koch loaned John W. Koch sixty shares of the capital stock of the Stoneware Pipe Company that was owned by her. The evidence further shows that the money procured by these several loans was used by Koch and Pfister in the payment of the indebtedness for which they were liable.

It further appears from the evidence that Henrietta Koch was the owner of an insurance policy and that she disposed of this policy for about \$2500.00 and borrowed three thousand dollars from her sister and with this purchased from the Alton Banking & Trust Company the note of five ~~xxx~~ thousand dollars, with the collateral security, being the one hundred shares of stock of the Stoneware Pipe Company, and other stock, and she claims that this was turned over to her by the bank and that she is the owner of this note with the collateral security.

The bill in this case alleges, in substance, that John W. Koch was in fact the owner of the real estate above described and of the shares of capital stock referred to, and that he transferred the same to his wife, Henrietta M. Koch, for the purpose of defrauding his creditors, and seeks the discovery of that and other property which the bill alleges is concealed by them from the creditors of Koch, and asks that all such transfers be set aside as fraudulent and be subjected to the payment of appellant's judgment. The answer admits that the stock was transferred by John Koch to Henrietta M. Koch, as a gift, in the year of 1912, and

...and that after the war in 1918, the
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before any indebtedness had been incurred; also admits that he sold and conveyed the real estate above described to her but claims that she paid therefor a valuable consideration, and denies any fraudulent intent in the making of the several transfers.

Many errors have been assigned by counsel but the only ones argued by him are, that the gift of the four hundred thirty shares of stock was fraudulent and void and made for the purpose of hindering and delaying creditors, and that the conveyances of the real estate was without consideration and fraudulent as to the creditors of John W. Koch.

Upon an examination of this record we believe that a determination of this case depends upon the validity of the gift of John W. Koch to his wife Henrietta Koch of the four hundred thirty shares of the capital stock of the Stoneware Pipe Company. If the gift was valid then Henrietta Koch had the right to do as she chose with the shares of stock so obtained by her. If the gift was invalid then all of the rights that she claims to have acquired by such gift would not avail her anything as against the creditors of John W. Koch. It appears from this evidence that John W. Koch transferred and delivered 430 shares of stock aforesaid to Henrietta Koch in the early part of the year 1912, and at that time he was not indebted to exceed five hundred dollars and had abundant property wherewith to pay such indebtedness. This is not disputed. The only witnesses upon this question were John W. Koch and Henrietta Koch, both of whom say that this whole transaction was in good faith and for the purpose of preserving for her something out of their prosperity. It is said by counsel for appellant that because he used Koch

and his wife as witnesses that he would not be bound by their conclusions, which is true, but such facts as they stated and are not disputed would have to be taken and accepted by the court as true, and the matter of indebtedness probably owing by him at the time the transfer was made would be facts which, if not disputed, would have to be considered by the court in determining the questions involved in this suit. If it be true that John W. Koch was not indebted at that time or had ample property to pay what little indebtedness did exist, then he had, under the law, a perfect right to make a gift of anything owned by him to his wife and unless this gift should be made in anticipation of committing a fraud upon creditors it would be binding. It is unreasonable to suppose that they had in their mind at that time the committing of a fraud upon the appellant as appellant's debt was only as security and not contracted for more than two years after the transfer of this stock. It is very clear that at the time of the transfer of this stock that appellant was not a creditor of Koch. A husband may create a separate estate for his wife out of his own property if there are no creditors of the husband at the time whose rights would be put in jeopardy, and if there are such creditors if he retains a sufficient amount to liquidate itx is lawful. "It has never been held, to our knowledge, that a subsequent creditor can inquire into the fairness of the transaction, even if the conveyances to the wife be regarded as voluntary conveyances without actual consideration, for the sole purpose of creating a separate estate in the wife.... The law not only sanctions such a course, but in many instances it is nothing more than simple justice to the wife....

[illegible]

But it is the doctrine of this court that only creditors having claims when the fraud is committed can avoid such conveyances, unless it be shown the deed was made in anticipation of incurring debts to avoid the payment of which the conveyance was made". *Belknap vs. Surrency Manf. Co.*, 236 Ill., 134. And this doctrine has been announced by the Supreme Court in the cases of *Bridgford vs. Biddell*, 55 Ill., 261; *Tunison vs. Chamblin*, 88 Ill., 378; *Crawford vs. Logan*, 97 Ill., 336; *James vs. Dorsett*, 147 Ill., 54. It can not be said from the record in this case that the stock was transferred to Henrietta Koch in anticipation of incurring the indebtedness of appellant as this indebtedness was not incurred for two years afterwards, and it was only a security debt for the Builders Supply & Coal Company. We are of the opinion that under the facts in this case John W. Koch had a perfect right to give this stock to his wife at the time that he did. If it be true that he had the right to give this stock to his wife then she was authorized to use such stock for the purpose of purchasing the real estate in question, if she desired so to do. It appears from the evidence that she did sell and transfer to John W. Koch one hundred shares of this stock for the real estate in question, which she had the right to do. It further appears that with her own means she purchased from the bank the note for which the stock had been assigned as collateral security and holds this indebtedness and stock against her husband, and we can see no reason why under the conditions she should not do this, and that she would be entitled to the payment of this note first out of this stock, and the rights of the appellant are protected in the decree as it is given the right to

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States. It is therefore necessary for the Commission to continue its investigation of the activities of the Communist Party in the United States.

redeem this stock.

This disposes of the only questions argued by counsel for appellant, and, as we think, fully determines the rights of the parties herein.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Not to be reported in full.

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES

OF THE STATE OF NEW YORK

IN SENATE, JANUARY 18, 1887.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

ON JANUARY 18, 1887.

ALBANY: PUBLISHED BY THE STATE OF NEW YORK.

1887.

THE STATE OF NEW YORK.

THE COMMISSIONERS OF THE LAND OFFICE.

ALBANY: PUBLISHED BY THE STATE OF NEW YORK.

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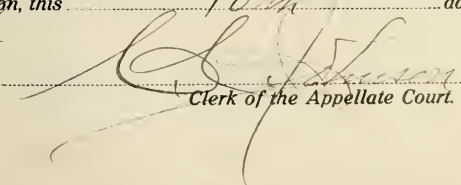
THE COMMISSIONERS OF THE LAND OFFICE.

ALBANY: PUBLISHED BY THE STATE OF NEW YORK.

1887.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 10th day of April
A. D. 1918


Clerk of the Appellate Court.

NOIN



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Town of Grand Prairie,
Appellee

ERROR TO
APPEAL FROM

vs.

County COURT

No. 43

October Term, 1917.

Jefferson COUNTY

C. F. Schneider,
Appellant

TRIAL JUDGE

HON. ROBERT E. HICKMAN

Term No. 43.

In the Appellate Court,
Fourth District.

Agenda No. 20.

October Term A. D. 1917.

Town of Grand Prairie,)
Appellee.)

vs.)

C. F. Schneider,)
Appellant.)

Appeal from the Jefferson County
Court.

McBride, J.

The appellee recovered a judgment in the court below for five dollars and costs as a penalty for the obstructing of an alleged highway in said county. A judgment was rendered in this suit against the appellant at a former term of the Jefferson County Court from which judgment the appellant prosecuted an appeal to the March Term 1916 of this court. Upon a hearing of said cause it was determined by this court that the highway charged to have been obstructed was an "old trail that ran across vacant and unoccupied grounds which had not been fenced. That such trail had been abandoned by the public and two other roads across the land had been used from time to time in place of the same. That there had in fact been no established line of travel across the land in question but that the trail or traveled way had been shifted from place to place at different times. From an examination of the record we have concluded that the attorneys failed to show that the public had acquired a right of way by prescription at the place along the line where appellee claims the old trail was located across the land in question". The cause was reversed by this court because the lower court refused to permit the appellant to prove that certain roads east of the trail had been traveled for the

JAMES H. H. 43. IN THE DISTRICT COURT,
 COUNTY OF ...
 October Term A. D. 1917.

To the Honorable the Justices of the Supreme Court of the State of New York:
 We, the undersigned, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of ...

Executed at ...

The within recovered a judgment in the sum of ...
 and the said defendant and costs of a general for the ...
 recovery of an alleged debt in said county. A judgment ...
 was rendered in this case against the plaintiff of a sum ...
 less of the defendant twenty four hundred and ...
 judgment rendered on appeal to the Court of this ...
 Court. Upon a finding of said Court it was determined by ...
 this Court that the plaintiff ought to have been satisfied ...
 was an oral trial that the parties agreed and concluded ...
 judgment which had not been rendered. That such trial had been ...
 conducted by the parties and two other persons before the Court ...
 had been used from time to time in view of the fact that ...
 there had in fact been an established line of verbal agreement ...
 the fact in question for that the trial had proceeded very ...
 from which it was clear to all of the parties. The ...
 an examination of the record we have concluded that the ...
 former failed to show that the parties had concluded a trial ...
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 called to trial the said trial was located before the Court in ...
 question. The same was referred to this Court because the ...
 Court could not refuse to grant the request to have the ...
 certain records of the trial had been provided for the

last six or seven years by the general public and that the old trail had been abandoned and grown up in brush, trees and ditches so that it had become impassable for five or six years, and that there were no obstructions on the old trail. The appellate court reversed the county court at the former hearing and remanded the cause for a new trial. The cause was again heard and judgment again rendered against the appellant for five dollars and costs, to reverse which this appeal is prosecuted.

The evidence introduced by plaintiff in the trial below is substantially the same as that introduced upon the former trial, and in the former opinion rendered by this court it was stated, that, "For many years, as shown by the proofs, there has been a road running diagonally across Section 23 in the town of Grand Prairie, in said county, starting at the north east corner and running to a point near the middle of the south line of the south west quarter. The section was heavily timbered and the road in question was simply a ~~trail~~ ^{trail} through the woods, no part of it having been laid out. A few years ago the road was changed by petition as to the north east quarter so that it ran along the entire east line and thence west half way along the south line of said quarter section. It was also changed by agreement as to the south end so that it ran along the south line of the section to the south west corner of the south east quarter thereof, and thence north on the quarter section line an eighth of a mile from where the road took the direction of the old trail northeasterly across the north sixty acres of the west half of said south east quarter of said Section 23, and connected with the road laid out by petition as aforesaid

Just as in every year of the general family and that
the old trail had been abandoned and grown up in brush,
cross and divide to trail it had become impossible for the
of all sorts, and that there were no indications on the old
trail. The officials could not find the old trail, and
found nothing, and abandoned the search for a new trail. The
cross was again found and followed until reaching the
original old trail which was found, in places with little
ground is presented.

The evidence presented by the trial
below is substantially the same as that presented upon the
first trial, and in the former opinion rendered by this
court is the same, that, "the only party, as shown by the
evidence, there has been a real and substantial change
between it in the form of stated parties, in this regard,
existing at the same time and coming in a point near
the middle of the same line of the same way quarter. The
section was properly situated and the land in question was
simply a ~~part~~ ^{part} of the same, as well as it being from
land out. In the year and the year the section in question
was at the north and quarter as well as the entire
land line and a more said well along the south line of
the quarter section. It was also divided by a line of the
to the north and as well as the south line of the
quarter to the northwest corner of the north west quarter
section, and across north on the quarter section line as
shown on a plan from which the same can be located as
the old trail and necessarily shown, for each party party of
the west half of said north west quarter of said section 31,
and bounded with the west half of section 32 adjacent

at the north west corner of said sixty acres. It thus appears that the old trail has been abandoned and the road placed on Section and half Section lines except that part passing diagonally across said north sixty acres of the west half of the south east quarter of said section 23, and it is with this part that we are now concerned".

Upon a ~~ix~~ re-trial in the court below the appellant introduced evidence which tended to show that for several years last past the old trail through the sixty acres mentioned had been almost if not entirely abandoned. That it had grown up in brush and was unfit for travel and that the travel during this period was east of the old trail and passed diagonally across appellant's meadow and connected with the old trail at or near the half section line. The alleged obstruction was placed near to or across the old trail at a place where it had grown up in brush and where the travel upon the old trail had ceased for several years last past and had been during this time passing diagonally over appellant's meadow as above stated. It is true that it appears from the evidence in this case that for forty years or more prior to the time that the travel was diverted across appellant's meadow that this old trail had been used in connection with an old trail passing through the north east quarter of said section and one passing through the south east quarter of the south west quarter of said section until the trail in the north east quarter was changed to the east and south lines of said quarter section and that of the south east of the south-west was changed to the east line of the south east quarter of the south west quarter of section 23, since which time these roads have been used in connection

with the old trail in the south east quarter aforesaid, and the meadow road diverging from the old trail as aforesaid. The appellee insists that inasmuch as this road or old trail had been used by the public for travel for more than forty years prior to the shifting of the travel across appellant's meadow, that it became a highway by prescription. The appellant contends that inasmuch as the old trail passed through a timber county up until within a few years last past and that as the south east quarter of said section 23 had not been fenced that the law permitting the acquisition of a highway by user was not applicable and could have no force or effect where such highway passed through timber and unfenced lands, and cites in support of this contention the case of the town of Brushy Mount vs. McClintock, 150 Ill., 133, in which opinion it is said, "In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner".

It is insisted by appellee that because houses were built at three or four different places along or near this trail, one of which was built by the appellant, and because of the fact that this highway was worked by the public authorities that this was notice to appellant that the public was claiming it as a highway. It appears from the evidence that the houses that were built along this trail were built in the timber and at an early day, and while it does appear that some work was done upon this trail it was at entirely different points from the place in controversy. This record fails to show little if any work upon the highway at this

[illegible]

place but a bridge was built upon the Dunkel road and another culvert or bridge built down upon the Payne part of the road but it is not clear whether these bridges were built before or after the road had been changed at these places; and while it is true that appellant did work the road, yet such work was done up near the school house the distance of nearly one mile from the place in question.

It is also insisted that the changing of the roads by Dunkel on the north east quarter and by Payne on the south half of the south east quarter of the south west quarter was notice to appellant that the public was claiming this as a highway. As we read the record the highway upon the north east quarter known as the Dunkel road was changed by petition. That is to say, a petition was presented and a road laid out along the east and south lines of the Dunkel tract but there was no action taken showing any vacation of the old trail that ran diagonally through this tract, and substantially the same procedure was had as to the Payne tract. We are not able to see how the granting of the petition for the laying out of these roads upon the section and half section lines would be any notice that the public was claiming the old trail as a highway when no steps were taken to vacate the highway. It appears that as soon as the new roads were laid out upon the section and half section lines that the travel along the old trail was abandoned and passed around the new roads and we think that the principal part of the labor done upon the highway as shown by this record was at or near the Dunkel and Payne tracts. The only bridges shown to have been built were along near these tracts.

It is also claimed by appellee that at the time

It is also claimed by those who are in the
position of being able to see the
whole of the world, that the world is
not a single entity, but a collection of
many small entities, each of which is
a part of the whole. This is the
view of the world which is held by
the majority of people, and it is the
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people who are in the position of being
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view which is held by the majority of
people who are in the position of being
able to see the whole of the world.

the petition was granted for a road east of the Payne tract that the appellant sold the commissioners a strip of land for the purpose of widening the road at that place, and appellee argues that this was an implied admission that the trail existed as a highway across his land. The Payne road, however, did not connect with the trail for thereafter the commissioners obtained the consent of Talbot to pass over a part of the twenty acres lying north of the Payne tract so as to connect with the trail and at about this time, or shortly thereafter, the line of travel across the meadow was installed and that road principally used. It is true the witness Stover says that the, "Appellant knew the public authorities claimed this road and that it was a public highway". This, however, is only a conclusion of the witness and it is not shown how he knew it. This conclusion, however, seems to have been formed about 1911 at a time when the appellant obstructed another portion of the trail with logs.

It is said that the appellant started the meadow road himself by directing others to go that way about the years 1905 or 1907, and says that, even after that, one or two teams a week passed over this old trail. If the old trail was a public highway eight or ten years before this obstruction was placed there then the appellant by his direction could not have diverted the travel along another and a different line and it seems to us that the very fact that he did direct and divert the travel from the old trail tends very strongly to show that even at that date he was not in any manner assenting to the old trail being used as a highway. It was testified to by appellant, and now insisted upon,

[illegible]

that appellant plowed across a part of this highway in 1902 and while other witnesses fix a later date of plowing across the highway, they do not deny that he plowed across it at the time he stated.

It is also contended that a survey of this trail was made in 1886 and the surveyer testified that he was employed to make the survey by the highway commissioners, but the making of the survey even under the direction of the highway commissioners can not be regarded as record evidence of a prescriptive right but could only be evidence of the situs of a road that had already been established. *Seidachlag vs. Town of Antioch*, 207 Ill., 280. And such survey or setting of stakes cannot be evidence of a dedication because there is nothing in the record to show that the owner of the land at that time had any notice of or was present at such survey and so far as we can find the survey was not made in accordance with any statutory regulation, and none has been pointed out to us. This land was at the time of the making of the trail in question timber land, vacant and unoccupied and continued to be so until within a few years last past, and then only a spot here and there was cleared up and put in cultivation, and it continued to remain uninclosed until the time of the placing of the obstruction in the alleged highway. To constitute a highway by prescription, "The use must be adverse, uninterrupted, exclusive, continuous and under a claim of right. (*Schmidt vs. Brown*, 236 Ill., 595). Here the use is merely permissive by the owner it is not adverse and forms no basis upon which a right of way by prescription can rest. The use of vacant, unenclosed and unoccupied land will be presumed to be by permission and not adverse. (*O'Connell vs.*

and other agencies in a wide range of foreign countries. The Agency, they do not deny, is indeed active in all the areas in which it is active.

[illegible]

Chicago Terminal Railroad Co., 184 Ill., 308, and cases there cited). An adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time. (City of Quincy vs. Jones, 76 Ill., 231)". I.C.R.R.Co., vs. Stewart, 265 Ill., 37.

It appears from the evidence in this case that there were fifty-two angles in this trail and that there were nine angles from where the road enters the appellant's land to whether it passes out of it, and according to this testimony it must have been a very tortuous route and the small amount of work that was done upon this road, especially where it passed through appellant's land, and other acts of recognition as claimed by appellee, are not in our judgment sufficient to warrant us in saying that the appellee has established a highway at the place of the obstruction. "Our experience teaches that land has been used by the public in different parts of the state, for purposes of travel, when it was vacant and unoccupied, the owner having no occasion to occupy it exclusively. It would be unjust to say that the public, by this acquiescence, under such circumstances, acquired a title to a part of the land. (Kyle vs. Town of Logan, 87 Ill., 64). In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right. In the first place, it is unreasonable to suppose that road

Chinese Criminal Code, Art. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

authorities would claim, or a property holder suspect, that a public highway was to be located on the tortuous line of the road in question. The little work done on it in all the years that it has been traveled can not be said to amount to notice that it was being used under a claim of public right. The work did not amount to an improvement of a public highway. It was rather for the temporary purposes of travel". Town of Brushy Mount vs. McClintock, Supra.

After a careful examination of this record we can see no reason for changing our minds from that expressed in the former opinion in this case, and the judgment of the lower court is reversed.

JUDGMENT REVERSED

FINDING OF FACTS.

We find that the evidence in this case fails to show that a public highway existed at the place where appellee claims the obstruction was built.

Not to be reported in full.

unpublished work, and, as a consequence, the work is not published.

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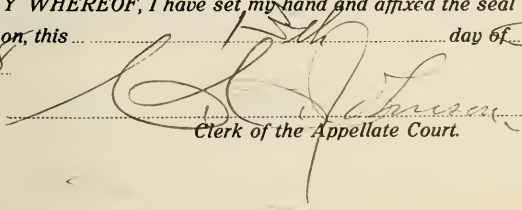
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100

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of April A. D. 1918


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 119

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Peter Hackethal,

Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 50
March
1918 Term, 1917.

Madison COUNTY

East Side Levee & Sanitary District,

Appellant

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 50.

In the Appellate Court,
Fourth District.
March Term, 1917.

Agenda No. 37.

Peter Hackethal,
Appellee.

vs.

East Side Levee & Sanitary
District,
Appellant.

)
)
) Appeal from the Circuit Court
of Madison County.
)
)

McBride, J.

The appellee recovered a judgment against the appellant in the court below for seven hundred dollars and costs, to reverse which this appeal is prosecuted.

The principal facts in this case are, that in 1910 and 1911, appellant constructed a large canal, one hundred feet wide at the bottom and ten feet deep, with levees or embankments upon each side of the height of from ten to twelve feet and of the width of about fifty feet. This canal is commonly called the Cahokia Creek Diversion Channel and is about four and a half miles long and extends from its junction with Cahokia Creek where the Vabash Railroad intersects the creek in Edwardsville Township in Madison County, Illinois, and extends due west to the Mississippi river. It does not follow any natural water course and has no inlets to permit the water from the adjoining lands to pass through this embankment. The lands in possession of appellee, lay north of this embankment and were of about the same character with reference to fertility, and the lay of the land as the lands were in the case of Handfielder vs.

View No. 80.
 IN THE SPECIAL COURT,
 TOWNSHIP OF...
 March Term, 1917.

Peter J. ...
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Witnesses.

The following witnesses were sworn to and examined and
 deposed in the above cause as follows:

The witness ...
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East Side Levee & Sanitary District, the appellant herein, 194 App., 262, and of the case of Moehn vs. East Side Levee & Sanitary District decided by this Court at the March Term 1916, not yet reported.

The evidence tends to show that in case of heavy rain falls the waters flow from all of these lands south to this embankment. It further appears that on the east of these lands there is an embankment built by the Bluff Line Railroad, and some of the witnesses state that the water in a state of nature, and before either of these embankments were constructed flowed south and east but that the construction of the Bluff Line Railroad prevented the water from flowing to the east and since that time its flow has been to the south. The principal questions involved in this case have twice before been presented to and determined by this court in the cases above referred to, and this court in both cases held that the appellant was liable for damages done to the crops to the extent that the embankment impeded the natural flow of the water. As this case will have to be reversed on account of an erroneous instruction, as herein-after noted, we deem it unnecessary to discuss the liability under other errors assigned.

It does appear from the record in this case, however, that this water in a state of nature flowed to the east, as well as to the south, but the embankment erected by appellant only obstructed the waters coming to the south, and the embankment erected by the Bluff Line R. R. obstructed the waters flowing to the east, at least tended to, and the evidence tended to show that both of these embankments, to some extent, obstructed the natural flow of the water.

1945, and at the time of the trial, the defendant was not a member of the Communist Party, and at the time of the trial, the defendant was not a member of the Communist Party.

[illegible][illegible]

The appellee's tenth instruction is as follows, "The court instructs the jury that even if you find from the evidence that the Bluff Line Railroad combined with the levee of the East Side Levee and Sanitary District caused the damage to plaintiff's crops by holding the water upon the lands of plaintiff of Peter Hackethal, still this fact, if such be a fact, will not relieve the defendant from liability in this case, and as to such damages, if any, you shall find a verdict for the plaintiff". This instruction is erroneous. It permits a recovery against the appellant for damages done by the combined act of appellant and the Bluff Line R.R. There is no evidence in this record tending to show that the Bluff Line Railroad and the appellant jointly constructed these embankments but one was constructed by the Bluff Line at one time and the appellant at another, and so far as the record discloses, neither had anything to do with the construction of the other's embankment. Under such conditions the appellant could not be liable for any damages inflicted by the wrongful act of the Bluff Line Railroad.

Counsel for appellee cite the case of Kankakee & Seneca R.R. Co., vs. Moran, 131 Ill., 288, in which it is decided that all who contribute to a tort by their acts or otherwise, are liable and become joint tortfeasors. This is undoubtedly the law but we do not think it applicable to this case, as there is no evidence to show them to be joint tortfeasors, and it is admitted by counsel for appellee that they are not joint tortfeasors, and it certainly is the law that if the wrong complained of consists of two independent acts and performed by two independent parties, at different times, that each party will be liable only for the amount it

The first of these is the fact that the
 evidence is not sufficient to establish
 the fact that the defendant is guilty
 of the crime charged. The second is
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 the defendant is guilty of the crime
 charged. The third is the fact that
 the evidence is not sufficient to
 establish the fact that the defendant
 is guilty of the crime charged.

contributed to the damage sustained. The Equitable Powder Mfg. Co. vs. C.C. & St. L. N. R. 135 Ill. App. 265; Luce vs. Fox & W. Imp. Co. 19 Wis. 112; Willard vs. Red Bank Oil Co., 151 Ill. App. 433. This instruction was erroneous and warranted the jury in giving to appellee a larger verdict than he was entitled to, and for this reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

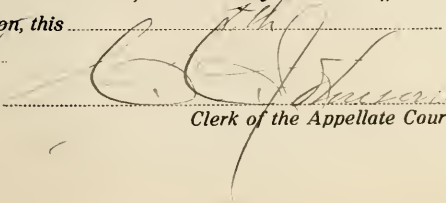
He was admitted to the bar at New York City in 1907 and has since practiced law in New York City and New Jersey.

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10019

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of April A. D. 1918.....


Clerk of the Appellate Court.

4115

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 120

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Stanley Milauskis,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

City

COURT

No. 52

October Term, 1917.

East St. Louis ~~COUNTY~~

Terminal Railroad Assn. of St. Louis,

Appellant

TRIAL JUDGE

HON.

W. M. VANDEVENTER

Term No. 52.

In the Appellate Court,
Fourth District.

Spends 00.40.

October Term, A. D. 1917.

Stanley Milauskis,
Appellee.

vs.

Terminal Railroad Association
of St. Louis,

Appellant.

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Appeal from the City Court
of East St. Louis, Ill.

McBride, J.

The appellee recovered a judgment against appellant in the court below for two thousand dollars and costs, which it is sought to reverse by this appeal.

It appears from the record in this case that the appellant is the owner and possessed of a great number of railroad tracks in the city of East St. Louis that consisted of one lead track and thirty or thirty-five yard tracks. The yard tracks extend in an easterly and westerly direction and the lead track in a northerly and southerly direction. The lead track crossed St. Clair Avenue at or near Cahokia Creek. The ice plant at which appellee was engaged at work at the time of the injury is about one quarter of a mile south of St. Clair Avenue. The building known as the Armour office was located near this lead track and about half a mile in a northerly direction from the ice plant. It further appears that the ice plant was surrounded by the railroad tracks of the appellant and that there was no public way for the employees of the Armour Car Lines to reach the ice plant from the streets of the city of East St. Louis except by passing over appellant's property. There was a

The speaker was a young man of about twenty years of age, with a fair complexion and a high forehead. He was dressed in a dark suit and a white shirt with a high collar. He stood at a podium and spoke into a microphone. The audience was seated in rows of chairs, and the room was dimly lit. The speaker's voice was clear and confident. He began by introducing himself and then proceeded to discuss the importance of the topic at hand. He used several examples to illustrate his points and concluded with a strong statement of his beliefs. The audience listened attentively throughout the speech.

beaten track of the width of four feet or more on the west side of the lead track extending from below the ice plant up to or near St. Clair Avenue, and the men engaged at work at the ice plant usually came from St. Clair Avenue down across and over appellant's railroad tracks and along this beaten track and had done so for twenty years. The ice plant was used for the re-icing of cars and it did business with Armour & Company, Swift & Company, Morris & Company and other packing plants and fruit dispatchers. The cars of the several companies were run in to the ice plant upon the tracks of appellant, re-iced and then pulled out and put upon the main track for shipment. The appellee had been engaged at work for the Armour Car Line Company for about five months prior to receiving the injury complained of, and on the 16th day of July 1913 at about the hour of ten o'clock A.M. the appellee received an order for the payment of his wages and was directed by the Armour Car Lines Company to take the order up to the office of Armour & Company for payment. Appellee and five or six of his associates went with their orders to Armour & Company office, obtained payment and were returning to their work and after crossing St. Clair Avenue passed down on the west side of the lead track along this beaten path and after going a short distance south from St. Clair avenue appellee was struck by one of appellant's cars, knocked down, fell under the car and was badly injured. It further appears that just after the appellee had left St. Clair Avenue that he passed a train consisting of an engine and five or six cars on appellant's track, and it further appears that very shortly after passing this out of cars that the appellant without sounding the whistle or ringing the bell pushed the rear car in and upon this lead

track and it was permitted to run down the track without any brakeman and no warning given of its approach and it came upon appellee from the rear and struck him. It also appears that appellee and one other person were walking side by side along this beaten track at the time the car struck appellee, and there were three or four persons walking singly behind appellee and the car passed by them but they did not observe it until it passed and they had no warning of its approach. It also appears that at this time another train was passing along appellant's tracks close by which made considerable noise so that appellee nor any of his associates heard or knew of the approach of this car until it reached them.

It further appears from the evidence in the case that on and prior to May 1913 there had been some pilfering in the yards and Mr. Taylor, the superintendent of the Armour Car lines, and Mr. Krause, the superintendent of the ice house, had a conference with Mr. Burlingame, the general superintendent of appellant, with a view of stopping the men from traveling over the railroad lines and was confining them to some particular place. Mr. Burlingame referred them to a Mr. Hines and as a result of the conference it was agreed that the employees should be directed to pass to and from their work along this beaten pathway on the west side of the lead track, where appellee was traveling at the time he was injured. The employees of the Armour Car lines were called together at that time and notified of the result of the conference and directed thereafter to travel along this beaten way. The appellee was present at the time this direction was given to the employees as aforesaid.

The appellee filed three original and three amended counts. The first count, after setting forth the facts substantially as above detailed, aver that while he was in the exercise of due care for his own safety the defendant on the track near to where such space or pathway was located carelessly and negligently and without any warning pushed a large number of freight cars along and over said track without giving any warning but negligently and carelessly omitted to sound any bell or whistle whereby plaintiff could be advised of the approach of said cars and by reason thereof he was struck and injured.

The second and third original counts are substantially the same as the first, varying only in details.

The amended counts to the declaration charges substantially the same negligent acts on the part of appellant as the original counts; that is, that they pushed the said cars down the track without giving any warning or signal of any kind and without having any brakeman or other person upon the rear car. The principal difference in the amended and original counts is that in the original count he charged that he was in the employ of the Armour Company at the time and in the amended counts he charges that he was in the employ of the Armour Car Lines. The difference between the amended and original counts will be hereinafter more specifically commented upon.

The errors assigned and argued by counsel for appellant are, that the appellee was at the time of his injury a trespasser, and that the appellant owed him no duty other than that of refraining from wilfully or wantonly injuring him. There can be no doubt of the correctness of this doctrine which has been announced time and time again by the

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1. The first of these is the fact that the evidence is circumstantial and does not establish beyond a reasonable doubt that the defendant was the person who committed the crime.

[illegible]

several courts of this state. The question, however, that concerns us most under the facts in this case is, "Was the appellee a trespasser". While it does not appear that the appellee was engaged at work or directly connected with the appellant, yet it does appear that he was at work for the Armour Car Lines Company which was engaged in the re-icing of cars that were shipped into the ice plant and taken therefrom by appellant's engine and on its track so that in the performance of appellant's work it was necessary to re-ice these cars and to do so some one must perform this work and appellee was then engaged at this work. The appellant was interested in the prosecution of this work and he do not understand the law to be that one must be engaged specifically in the work of the owner of the premises before he can lawfully enter such premises. He may be engaged in the work the prosecution of which implies that he should enter upon such premises, or there may be an expressed invitation for him to enter upon the premises, as we think there was in this case. "The duty to one who comes thereon by the owner's invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that portion of the premises required for the purpose of his visit. Under such circumstances the party is said to be on the premises by implied invitation of the owner". *Francy vs. Union Stock Yards Co.*, 235 Ill., 526. While appellee was engaged in his work at the ice plant it must be remembered that there was no other mode of access to this plant except over the property of the appellant, and this was known to the appellant when it was placing its cars at the plant for re-icing and it certainly was interested

in having them re-iced.

It further appears that in the month of May, prior to this injury, that the appellant had designated the particular route that appellee should take in going to and returning from his work at this ice plant, and the appellee was at the time of his injury pursuing the route so directed and this, in our mind, would constitute an expressed invitation to pass over appellant's premises to perform the work in which the appellant, to say the least of it, was somewhat interested. The same doctrine is sustained by our Supreme Court in the case of Pauckner vs. Wakem, 231 Ill., 280. It was further said in the case of Pauckner vs. Wakem, supra, that there is a well defined distinction between a mere licensee and one who comes upon the premises of another by invitation, express or implied, and that to come upon the premises under an implied invitation means that the visitor is there for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on. The same thing is said in the case of Furtell vs. Philadelphia Coal Co., 256 Ill., 110. The appellee was at the time of his injury engaged in a work in which he and the appellant were both interested, and he was traveling along the route designated by the appellant and we do not believe that he was a trespasser.

It is next contended by appellant that even if appellee was not a bare licensee and was at the place in question by invitation of appellant, still he has failed to prove that he was in the exercise of due care and caution for his own safety. There is no rule of law better settled than that where there is any evidence fairly tending to show

due care or circumstances from which such may be inferred that the finding of a jury upon this question is conclusive. There has been nothing developed upon this trial that leads us to believe or to say that the appellee was not in the exercise of due care. He was walking along the beaten path in a usual manner, and while the pathway was of the width of four feet he would not necessarily be required to walk upon any particular part of this pathway, unless there was something in the surrounding conditions that would indicate that he should do so, and there was nothing of the kind here, as the evidence is very clear that the appellant was negligently operating its cars and running them backward without any brakeman or other person upon the car to control it, and without giving any warning of any kind by which the appellee or any of his associates could know of its approach, and not knowing or having any reason to know of the car coming we can not say that the verdict of the jury was manifestly against the weight of the evidence in finding that he was in the exercise of due care for his own safety. The questions of whether appellant was guilty of negligence or the appellee guilty of contributory negligence at the time of the injury were questions of fact which were properly left by the court to the jury. *Elgin, Joliet & Eastern Ry. Co. vs. Thomas*, 215 Ill., 155. *Wabash Ry. Co. vs. Brown*, 152 Ill., 484.

It is next insisted by counsel for appellant that the court erred in sustaining the demurrer to the plea of the statute of limitations filed herein. This accident happened July 16, 1913. The original declaration was filed December 31, 1914; the amended declaration was filed March

22, 1917, more than three years after the happening of the injury. The amended declaration as claimed by appellant was to the effect that in the original declaration it was alleged that Armour & Company owned and operated the ice house and that appellee was an employe of Armour & Company, and that the allegations with reference to the right to use the pathway were alleged to have been given to the employee of Armour & Company, and the allegations with reference to the damages were that appellee's right arm was amputated; that in the amended declaration it was alleged that the ice house was owned by Armour Car Lines and that appellee was an employe of Armour Car Lines, and the rights to the use of the pathway are alleged to have been granted to the employee of the Armour Car Lines, and that the allegations with reference to the damages are that appellee's left arm and the finger of his right hand were amputated. It is true, as appears from an examination of the declaration that in the original counts it is alleged that appellee was engaged at work for Armour & Company and in some places that the permit to use the path was given to the employee of Armour & Company who were required to labor at such ice house, and some other differences are suggested, but as we view it none of these questions are material and none of them go to make up the cause of action in this case. The cause of action is based upon the negligence of the defendant as charged in the original and amended counts of the declaration, and the exercise of due care by the appellee and his right to recover, in the original as well as the amended counts, all of them show upon their face that appellee was upon appellant's premises by invitation so that the questions as to who owned and

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operated the ice plant, and for whom the appellee was at the time engaged at work, can not be material. They are only circumstances attending the question as to his right to be upon the property of appellant. They are mere details out of which the right that he alleges did exist arose. In the case of *Swift & Co. vs. Foster*, Admr. 163 Ill., 50, it was held that the addition of counts in a suit for the death of an employe from the fall of lumber while being hoisted, charging that such fall was due to the use of a defective cog wheel, is not the setting up of a new cause of action barred by the statute of limitations, subsequent to the original commencement of the cause although it was originally alleged that the fall was from the negligence of an employe, not a fellow servant, in using the machinery. The original declaration in this case did state a cause of action but after having stated such cause of action, giving the negligence of appellant and the care of appellee it recited other facts by which its rights accrued but does not introduce any new cause of action, and we do not believe that the filing of this amended declaration was barred by the statute of limitations. *Carlin vs. City of Chicago*, 262 Ill., 572. It may be true that in the statement of these matters, that did not go to make up the acts of negligence complained of, might from the facts in the case constitute a variance. When such facts developed that did not necessarily go to make up the cause of action the court, on motion, at any period in the trial would permit an amendment so as to avoid the variance, "But the doctrine of variance is one thing and the statement of another and different cause of action is something else". *Carlin vs. City of Chicago*, *Supra*. It

The statement of evidence and exhibits in this case is
 voluminous, and the evidence is so voluminous and
 extensive that it is not possible to set out in
 detail the evidence in this case. The evidence is
 so voluminous and extensive that it is not possible
 to set out in detail the evidence in this case.

appears to us that the effect of this amendment was simply to avoid a variance and did not state a new or different cause of action.

We are of the opinion that the verdict in this case was fully justified by the evidence and that the court did not commit any reversible error in the trial of the case, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

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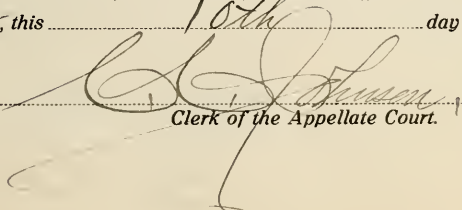
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 10th day of April A. D. 1918.


Clerk of the Appellate Court.



4118

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 134
THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Albright & Lawrence,

Appellees

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 70

October Term, 1917.

Union COUNTY

Illinois Central Railroad Company,

Appellant

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 70.

In the Appellate Court,

Agenda No.36.

Fourth District.

October Term, 1917.

W.A.Albright and)
M.T.Lawrence, doing business)
as Albright & Lawrence,)
Appellees.)

vs.)

Appeal from the Circuit Court
of Union County.

Illinois Central Railroad)
Company,)
Appellant.)

McBride, J.

Appellee instituted an action of assumpsit against the appellant in the Circuit Court of Union County, Illinois, to recover damages for injuries to horses and mules shipped on one of appellant's trains from Dongola, Illinois, to East St. Louis on October 23, 1916.

It appears from the evidence that on the 23rd day of October 1916, the appellees loaded in to a stock car at Dongola at about six o'clock in the evening eight horses and three mules belonging to them, together with three cattle and seventy-five hogs belonging to Fred Johnson and Thomas Keller. A board partition was put in the car to separate the horses and mules from the rest of the stock. This board partition consisted of an oak plank nailed across the car with eight penny nails. The horses and mules were not tied. It appears that the agent of appellant was present at the time of the loading of this car of stock and made no objection to the manner in which it was loaded. It further appears from the evidence that these horses and mules were in good condition at the time that they were loaded, except that one

Page No. 10. In the appellate court,
 under review, 1917.

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| Appeal from the Circuit Court
of Cook County. | Appellate and
Circuit Court,
Cook County,
Illinois. |
|--|--|

SYNOPSIS.

Appellate court sustained an action of replevin against
 the defendant on the ground that the defendant, Illinois,
 to prevent recovery for injuries to persons and other subjects
 on one of defendant's estates (see County, Illinois, to last
 of issue on October 21, 1917).

It appears from the evidence that on the 21st day
 of October 1917, the defendant located in to a tract out of
 Chicago of about 20 acres in the eastern edge of the city and
 from which defendant is now, together with other parties
 and several other persons, in the year of 1917, and from the
 estate. A lease was made out in the year of 1917, and the
 court and other from the tract of the estate. The court
 action consisted of an order which states that the court
 against party called. The court was called and the court
 against party called. The court was called and the court
 of the estate of 20 acres of land was in the year of 1917
 to the court in the year of 1917. The court was called
 from the evidence that these persons and other were in the
 possession of the land and they were called, except that the

of the mules about six months previous to this time had pneumonia and was afflicted with what they call pones under the belly but the evidence of one of the appellees is that this mule had entirely recovered before the shipment, and this is not disputed. The testimony of appellees witnesses further tends to show that the horses and mules were properly loaded, were not vicious and would not kick nor bite and that some of them had been in shipments prior to this time. It further appears that at Anna, Carbondale and Duquoin, cities through which the train passed, that the horses were restless and were kicking and squealing at the different stops made by the train before it reached Pinckneyville and when they arrived at Pinckneyville the mule in question was down and two planks were kicked off the side of the car on the end in which the horses were loaded. It further appears that at Pinckneyville the stock was unloaded and the mule was pulled out of the car and shortly thereafter died. The remainder of the stock was placed in the car and on a later train shipped into East St. Louis. The evidence further tends to show that when the horses reached their destination that some of them were injured, one of them had a dent in one eye, the other eye skinned, the legs were swollen and skinned in places, and some evidence tending to show that some of the horses were permanently injured. The jury found a verdict for the appellees and judgment was rendered thereon for \$97.50, which appellant insists is contrary to the evidence in the case.

It is insisted by counsel for appellant in their argument that even if the stock was loaded in good condition and health that appellees failed to show that it was in an injured condition when unloaded at the National Stock Yards, and then says that the first time the stock was seen by

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appellees after its arrival was twelve hours after it had been placed for unloading by appellant. It may have been several hours after the car had been placed for unloading before the appellees saw the stock but the car was placed upon what they called the ice plant switch and there left standing and one of the appellees testified that he saw this stock in about one hour after it had been unloaded and it was then in an injured condition and describes the horses limbs as being skinned and swollen and the ~~xxx~~ eyes of one of the horses injured, and giving other descriptions that tended to reduce the market value of the horses. The witnesses for appellees testified that the horses and mules were in good condition and properly loaded at the time they were put upon the cars at Gondola, and that the agent of appellant was present and made no objection to the manner in which the horses and mules were loaded, and we believe that the jury were warranted in finding that the stock was properly loaded and that it was not in good condition when it reached its destination and this of itself is sufficient to create a liability against the appellant unless it is made to appear from the evidence that the injury was attributable to the act of God, the public enemy or the vices of the animals themselves. *Burke vs. U. S. Express Co.*, 87 App., 505. It is true that it appears from the testimony that when the train was stopped at the several stations above named that the train men heard the horses squealing and kicking and that was kept up until they arrived at Pinckneyville when they, for the first time, discovered that the mule was down. It appears that when the mule got down that it crowded the other horses so that they were fighting one another and this may have been the condition in which the stock was in at the dif-

times at the different
ferent stations that the train men heard them kicking and squealing but they failed to ascertain what the trouble was until they arrived at Pinckneyville.

It is insisted by counsel for appellant that it was negligence in the appellees to ship the mule above described because of its former condition but under the testimony of the witnesses for the appellees at the time that the mule was shipped and the fact that it had fully recovered from the fever several months before this shipment and was in good condition at the time of the shipment, we are unable to say that the jury were manifestly wrong in finding that the appellees were not guilty of negligence in shipping this mule, and this direct question was presented to the jury by the instructions of the defendant.

These are all of the points now urged by appellant in its argument for a reversal and all of them were submitted to the jury by definite and particular instructions and they were all questions of fact upon which the evidence of appellees tended to show that the stock was in good condition when it was loaded, that when it arrived at its destination and was unloaded that it was injured and that it was properly loaded and not vicious, while the evidence of appellant tended to show the opposite of these questions or at least a part of them but the jury determined the issues of fact thus made in favor of the appellees. The judgment is small and we can see no reason for holding that the verdict of the jury was manifestly against the weight of the evidence, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

It is located on Highway 100, about 10 miles from the town of...

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of April A. D. 1910.


Clerk of the Appellate Court.

24.119

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

211 I.A. 135

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Sallie Odom,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 71.

October Term, 1917.

Williamson COUNTY

Joe Norwodowski et al.,

Appellants

TRIAL JUDGE

HON. BENJAMIN W. POPE

Term No. 71.

In the Appellate Court,

Agenda No. 21.

Fourth District.

October Term, A. D. 1917.

Ellie Odom,
Appellee.

vs.

Joe Borwedowski, Antone Matkewicz,
Barney Tonzzi, Louis Aroni, Joe
Aretti, Anton Phrancabagge, Peter
Hankle, James Roudy, W. R. Williams,
and Albert Barney,
Appellants.

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}
}
} Appeal from the Circuit
} Court of Williamson
} County, Illinois.

McRide, J.

It appears from the record in this case that Ellie Odom, the appellee, and Dennis Odom and others, children of Ellie Odom and Lem Odom, commenced separate suits against the appellants in Franklin County; whereupon a change of venue was taken to the Circuit Court of Williamson County and the two cases were tried together upon the same evidence and separate verdicts were rendered, one in favor of the wife Ellie Odom for five hundred dollars and one in favor of the children Dennis Odom et al for seven hundred dollars; to reverse which judgments these appeals are prosecuted and presented to this court upon one record.

It appears from the record in this case that Ellie Odom and Lem Odom were married on October 7, 1900 and that there was born to them six children, namely, Dennis, Sylvester, Charles, Thomas, Virgil and James, the eldest of whom is fifteen years and the youngest three years old. That the husband Lem Odom was at one time engaged in farming

and later with the Jenkins Oil Company and for the Fuller Construction Company. That up to about August 1915, and even after that he had been earning a good salary and had supported his wife and children reasonably well, furnished them with a comfortable home and supplied them with the reasonable necessities of life. That prior to August 1915 he had become addicted to the use of intoxicating liquors but the habit after that grew upon him very rapidly and he frequently became intoxicated, often having to be carried to his home; that he finally began to neglect his family, failed to support them or even furnish them with the necessities of life and that the family was at times, after August 1915, dependent upon her kindred and others for support. The husband continued his drinking excessively until some time in January 1916 when he became insane. An inquest or commission was had and this commission found that he became insane from the use of alcoholic liquors.

The evidence tended to show that before he acquired this habit of intoxication that he was an able bodied man reasonably competent and able to earn a good salary and furnished a livelihood and maintenance for his wife and children. The evidence further tended to show that the defendants knew of his habitual intoxication at the time they were selling him liquors. It also appears from the evidence of the appellants that prior to August 1915 the husband had at times become intoxicated.

The declaration, as shown by the record in this case, is in the usual form and charges that these defendants sold and gave intoxicating liquors to the husband which caused him to become and be habitually intoxicated.

and in consequence of such intoxication he neglected and ceased to follow any gainful occupation and squandered his money and property for intoxicating liquors and neglected and failed to provide his family with food and raiment and the necessaries of life and that in consequence of such habitual intoxication he became deranged and was on about the 28th of January 1916 adjudged insane and committed to the insane asylum at Anna.

The first error assigned and argued by appellants is that the judgment is contrary to the law and the evidence. Appellants insist that the evidence does not show that the defendant Antone Statkewicz sold or gave intoxicating liquors to Lem L. Edom at any time or that there were any sales made between August 1, 1915 and January 28, 1916 by Antone Statkewicz, Peter Bunkle, Barney Tonazzi, and Anton Phrancabogge during the time as alleged in the declaration. We do not so read this record. As we understand it, Harry Bates, Claude Fuller, Charlie Jones and G. W. Grippen testified that they had seen him drink during the summer and fall of 1915 in the several saloons referred to. As to the statement that no one testified that he was ever in the saloon of Antone Statkewicz is not sustained by the record, as it appears from the record that these several defendants were engaged in the saloon business in their respective saloons in West City and Claude Fuller, who says he was acquainted in West City, says "Well I have seen him in all the saloons out there. I have seen him buy at all places". And again says that he had seen him drink at all the places. It is true that he did not name Statkewicz particularly as being one of the places at which he saw him drink, but under the

evidence this place was included within the testimony given by Fuller and if counsel for appellants had desired to question it they could easily have called for the time and place of such drinking but they did not do so and Statkewice nor none of the defendants went upon the witness stand and denied having made any of these sales and we cannot say that the jury were not warranted in finding that he purchased liquor at the saloons of Statkewice, Rankle, Tanuzzi and Francabagge, as well as the other defendants. The evidence of some of the witnesses in fact specified some of these saloons as places where he purchased and drank liquors. We can not say that the jury was not warranted in finding that he purchased liquors at these places and this was a question of fact for the jury to determine.

It is next insisted that the court erred in giving appellees instruction No. 1 because it refers to his habitual intoxication prior to August 1, 1915, being the time charged in the declaration from which his habitual intoxication began. It is true this instruction refers to his intoxication prior to that date and then advises the jury that even though he was in the habit of becoming intoxicated prior to that date, still if the defendants sold him intoxicating liquors and caused him to remain habitually intoxicated and in consequence thereof he squandered his money, etc., as charged in the declaration, that they would still be liable. We can see no error in this instruction. The appellants attempted upon the examination of their witnesses to show that the husband had been in the habit of getting intoxicated prior to this time and we think that the appellee was fully warranted in presenting an instruction upon this line.

It is also insisted that instructions 4, 5, 6 and 7 when all read together with instruction No. 1 gives the jury the right to assess damages for insanity, loss of property, habitual intoxication for an indefinite time, when under the declaration the damages that could be recovered would be for loss of support for a period of six months. Instruction 4 merely defines what is meant or embraced within the term "means of support". Instruction No. 5 defines the duties upon the part of the husband and father to support the wife and children and what may be included within that support. Instruction No. 6 advises the jury that if the defendants had sold to the husband intoxicating liquors and had caused him to become habitually intoxicated and that by reason thereof plaintiffs had lost their means of support as charged in the declaration then they should find for the plaintiffs. The seventh instruction advises the jury that the sale of intoxicating liquors to a man must be of such a character as to appreciably contribute to his habitual intoxication and insanity. We think that the effect of these instructions is that if the defendants had sold intoxicating liquors to the husband to such an extent as to cause him to become habitually intoxicated and to cause him to become insane by reason of which he was not able to support his family, that then they were entitled to recover for the loss of their means of support and we do not think that the instructions are susceptible of the construction given them by counsel. cd

Complaint is also made of instructions nine and ten. Instruction nine simply defines what is meant by "exemplary damages"; and instruction ten advises that if the cd

jury believe from the evidence that the husband was a habitual drunkard, and these defendants knowing him to be such sold and gave him intoxicating liquors and caused him to remain habitually intoxicated, then such sales would be regarded in law as sales wilfully and wantonly made and would authorize the jury in their sound discretion to award plaintiff exemplary damages in addition to actual damages, if any such damages have been proven. We think these instructions are correct and are sustained fully by the case of Kennedy Bros. vs. Sullivan, 136 Ill., 24.

It is further urged that the court erred in admitting the complaint of Anna Ferrell whereby the husband was committed to the insane asylum. It appears from the record in this case that Anna Ferrell made complaint to the County Court and procured a commission of physicians to examine Lem Odom for insanity. That the court ordered this commission and summoned physicians to act upon it and this commission found that he was insane on account of alcoholism. The complaint filed by Anna Ferrell and the order of the court directing a commission to be summoned were clearly inadmissible, and while it may be true that as the finding of the commission was a matter of public record required to be kept and recorded that such would be admissible, yet it is quite clear that the complaint and other orders could not be. They were only introduced for the purpose of showing the effect that this habitual intoxication had upon the husband, besides there was other competent proof, that of the doctor and other persons, which sufficiently proved the insanity of the husband and that it was caused in their judgment from alcoholism, so

that we do not believe the appellants were in any manner injured by this testimony.

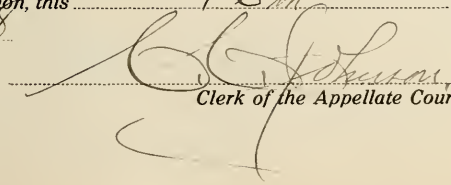
The judgments are not large, that of the widow for five hundred dollars and the children for seven hundred dollars, and it seems to us that upon a full consideration of this whole record that substantial justice has been done, and the judgments of the lower court are affirmed.

JUDGMENTS AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th day of April A. D. 1918


Clerk of the Appellate Court.

NOIN

21122

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 157

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{15th} ~~14th~~ day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Fred Lowrance,

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit COURT

No. 42

October Term, 1917.

Crawford COUNTY

American Glycerin Co.,

Appellant

TRIAL JUDGE

HON. J. C. FAGLETON

Term No. 42

State of Illinois

AE. 24.

In the Appellate Court

Fourth District

October Term, A. D. 1917.

Fred Lowrance,

Appellee,

vs.

American Glycerin Company,
a Corporation,

Appellant.

)
) Appeal from the Circuit Court
) of Crawford County.
)
)

Morris, J.

It appears from the record in this case that on or about the twenty-fifth day of July 1916 the appellant hired a team of horses from the appellee to be used by the appellant in transporting nitro-glycerin from appellant's factory near Stoy, in Crawford County, Illinois to Casey, Bridgeport or Lawrenceville as the occasion should demand. The trip to Casey and back was about sixty-six miles, and appellant claims that it informed appellee that it would make this round trip in about three days.

The appellant began using the team of horses about the twenty-fifth of July, and continued to use it for about two weeks, and until the fifth day of August, at which time one of the horses died while on a return trip from Casey. The weather was very warm and it is claimed by appellant that the horse died from the excessive heat. The appellee insists, and the evidence tends to show, that for two or three days before it died the horse was not well, and during this time lagged in his work, and did not eat his feed; and that appel-

lant's driver, who was Frank Burch, after discovering that the horse was lagging in his work and not eating his feed neglected to give the horse the proper attention, but continued to work him, and while it appears that the work was not heavy, yet the heat was excessive and one of appellant's witnesses, Mr. Ridgeway a veterinary surgeon, upon cross-examination stated that if the horse had received proper treatment on Friday night that he would not have had the attack.

This case was brought before a Justice of the Peace, and appealed to the Circuit Court of Crawford County where a trial by jury was waived and the cause tried by the Court, and judgment rendered for the appellee for Two Hundred Dollars and costs.

The briefs and arguments filed by the parties in this case are quite extensive but as we think the principal question made and discussed in the case is one of fact as to whether or not the appellant as bailee used ordinary care for the horse. Counsel for appellant and appellee agree substantially upon the law controlling cases of this character, that is, that a bailee for hire is bound to use ordinary care in the preservation of the property and such care as an ordinary prudent man would bestow upon his own property, and we think that this is the correct rule and is well sustained by the authorities. 7

It is further contended by the appellee that when it was shown that appellant received the horse in good condition that it is his duty to return the horse in the same condition to appellee or show some legal excuse, or in other words, show that he had not been guilty of negligence in caring for the horse, and this doctrine is practically con-

ceded by the appellant who says in its brief: "The mere fact alone that there is no evidence of negligence on the part of the appellant will not relieve it from liability because the law places the burden of showing that it was not negligent upon a appellant when a prima facie case is made out against the appellant." But it is contended by the appellant that there is abundant evidence to show that it used due care for this horse at the time in question, and the testimony especially relied upon in this particular is that of Frank Burch who was the man that drove the horse in question during all of the time that appellant had the team, and was driving him upon the day that he died, who testified that he drove him carefully and cautiously, and drove him in a walk, and watered them frequently, and that he saw nothing wrong with the horse until noon of the day that he died, and that as soon as he discovered that he was sick he called the veterinary Dr. Ridgeway, who treated the horse, but in spite of the treatment and in a short time after the veterinary was called, the horse died.

It is insisted by counsel for appellant that the evidence of Burch is sufficient and the only competent evidence to show that the horse was properly treated and cared for during the time that Burch was driving him, and it is claimed that this is not contradicted by any competent evidence and that the Court erred in admitting as appellant claims declarations of Burch just before and at the time the horse died as to the manner in which the horse had been treated. The appellant in its abstract failed to preserve any objections to the rulings of the court upon the competency or materiality of the testimony that is now complained of. If one desires to assign as error the admission of evidence

I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

then such should be preserved in the abstract but the abstract in this case neither discloses objections or exceptions to the evidence, and this is necessary before it can be considered by this Court. North vs. Zerwick, 97 Ill.App.306; Gibling vs. City of Mattoon, 167 Ill 22.

After a careful examination of this record we are of the opinion that appellant's contention as to the admissibility of this testimony is not well taken even if it had been preserved in the abstract in proper form.

The record discloses that upon the cross-examination of the witness Frank Burch, he was asked if he had not stated to Myers and other parties named that the horse was off of his feed and had been dragging for two or three days; that he ate all of his feed during Friday night, but Saturday morning and Saturday noon he did not eat any of his feed, to which the witness answered "no". And a question substantially the same was put to the witness as to a conversation that he had with Bernick, Dr. Ridgeway and Myers, to which the witness answered "No". After this witness had thus answered these questions upon cross-examination, counsel for appellant in re-direct examination asked the witness to give the conversation that he had with these parties, which he proceeded to do, and later on the Court permitted witnesses to testify to the particular statements that the witness Burch had been inquired of and denied.

If, when Burch answered that he had had no such conversations, the matter had not been taken up by counsel for appellant and the conversation brought out by him, then we believe that the Court would not have permitted these witnesses to testify to the particular conversation as it appears that in the examination of Doctor Ridgeway the appellee sought to

bring out a conversation between him and the agent Burch, but the Court held that he was not entitled to that conversation as it was not given in the line of his duty. Later on in his cross-examination Doctor Ridgeway testified that if the horse had received proper treatment on Friday night he would not have had that attack; and further states that the horse had not received the proper treatment for a day or two.

While there was some irregularity in the admission of these contradictory statements, yet after the conversation between the witnesses Burch and Myers had been brought out by counsel for appellant, we certainly think it was then competent to show that the witness Burch had made contradictory statements in the way of impeachment.

We cannot agree with counsel for appellant in the conclusion arrived at, that these statements or declarations of Burch were admitted in evidence as part of res gestae, but were admitted as contradictions of the witness Burch, and in the view we take of it, it is not necessary to determine whether such was a part of the res gestae or not. It is insisted by counsel for appellant that the horse died from natural causes and therefore there could be no liability. The rule of law conceded by appellant is, that the burden of showing that the horse did not die as a result of the negligence of appellant's servant, and the further fact that the only testimony whereby appellant sought to relieve itself of liability under this rule and to show due care was over-whelmingly contradicted, and we cannot say that the Court was not warranted in finding that the horse died for want of due or reasonable care upon the part of the appellant's servant, and the judgment of the lower Court is affirmed.

JUDGMENT AFFIRMED.

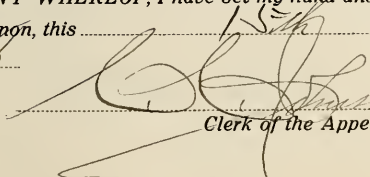
Not to be reported in full.

There is no doubt that the witness was a trustworthy person in 1934 and that the witness was a trustworthy person in 1934.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year 1900:

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of April A. D. 1912


Clerk of the Appellate Court.



4124

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 161

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

T. J. O'Gara et al, Trustees in
Bankruptcy, etc.,
Plaintiffs in Error

ERROR TO
~~APPEAL FROM~~

vs.

Circuit COURT

No. 10.
March Term, 1918.

Saline COUNTY

John Campbell,
Defendant in Error

TRIAL JUDGE

HON. A. W. LEWIS

March Term, A. D. 1918.

John Campbell,

Defendant in Error,

v.

T.J.O'Gara, et al, Trustees in

Bankruptcy, etc.,

Plaintiffs in Error.

Error to Saline.

Opinion by Higbes, J.

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This suit was brought by John Campbell against T. J. O'Gara, William Wiblack and E. Weltman, as trustees in Bankruptcy for the O'Gara Coal Company, a corporation, to recover for personal injuries sustained by him while working for said company in the mine known as the O'Gara Coal Company, mine No. 10.

On March 11, 1916, the plaintiff and his buddy, Tommy Stewart, were working in the third and fourth north entries off of the fifth west entry of said mine, their working places being at the face of the coal in said entries. These entries had been driven in a distance of about fifteen hundred feet and were connected by the cross-cuts. Under the law cross-cuts are required to be driven every sixty feet in order that the air may properly circulate through the entries, and as the work advances it is also required that each cross-cut except the one nearest the face, to be closed with substantial material and made as nearly air tight as possible. On the day in question the

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air traveled down the third and came back on the fourth north entry. When all the cross cuts were properly closed except the one nearest the face, the air that went through the entry would be forced down to this cross cut and would there cross over to the next entry. This would enable enough fresh air to travel down the entry past the last cross cut and to the face of the coal to dispel any gas that might accumulate at the face. The third north entry had been driven further than the fourth and a cross cut had been started from the third entry toward the fourth at a point seventy one feet from the last open cross cut. The evidence shows that this point was the extreme distance to which the air would properly circulate from the last open cross cut, and that the second cross cut from the face of the coal was closed with a canvas curtain.

The plaintiff and his buddy went to work about seven o'clock P. M. on March 10. After working a while in the third entry they went into the fourth about ten o'clock P.M., loaded six or seven cars of coal and under cut the coal in that entry to a distance of about five feet, after which they bored two holes, one next to each rib of the entry preparatory to placing the shots. These holes were about eight inches from the roof and were driven some four and one half feet into the face of the coal. It was the custom in preparing the holes for shooting, to put in a tube of powder about eighteen inches long and one and one half inches in diameter, wrapped in paper to protect it from the moisture. This tube would be pushed into the hole, clay dummies inserted and a fuse attached extending out about three feet. On this occasion after the powder had been inserted in the holes, it became necessary for the buddy of

plaintiff to go for more dummies. He was gone about ten minutes. Almost immediately upon his return an explosion occurred by which the plaintiff was severely injured.

It was the contention of the plaintiff that the curtain over the second cross cut from the face of the coal was torn, which caused the air to be short circuited and that enough air did not reach the face of the coal to drive away the gas which had been released by undercutting the coal and boring the holes; that when his buddy returned the gas which had thus accumulated near the roof of the entry by reason of the failure of the air to circulate at the face was ignited by the lamp which he wore on his cap and that this caused the gas to burn or explode; that plaintiff and his buddy threw themselves to the ground and the explosion passed over them. Plaintiff stated that when he raised his head he saw that the paper around the powder and fuse in one of the holes was burning and that there would be an instant explosion unless this fire could be extinguished which he attempted to do by grasping it with his hand but that he was too late and received the full force of the blast in his face and chest. Defendant contended that plaintiff and his buddy used different size bits in boring the holes, that the cartridge became caught in the right hand hole and the plaintiff struck it with a steel tamper which caused it to explode.

The declaration consisted of six counts. The first count charged that the entry had been driven more than sixty feet beyond the last open cross cut; that by reason thereof the air did not travel to the face, and the gas accumulated and caused the explosion. The second count charged the failure to mark the dangerous condition, consisting of an

accumulation of gas. The third count charged a failure to make a record of the dangerous conditions. The fourth was a common law count, charging a failure to exercise reasonable care to furnish the plaintiff a reasonably safe place in which to work. The fifth count charged a failure to close the last five open cross cuts and make substantial stoppings, and the sixth a failure to close the cross cuts next to the last open cross cut with substantial stoppings and the use of canvas curtains for that purpose which had holes in them. To all these counts the defendants filed a plea of general issue. ~~The case was~~ tried before a jury and a verdict returned for nine thousand dollars for which judgment was rendered in favor of plaintiff and against the defendants to be paid in due course of administration. Defendants below have brought the record here for review by writ of error.

No complaint is made that the trial court committed any error in its rulings on the evidence or in the giving or refusing of instructions or that the verdict is excessive. Hence the only question to be considered by this court and the only one discussed by counsel is whether the facts in proof constitute a cause of action. Defendant in error and his buddy, Tommy Stewart testified that they had been troubled with gas in these two entries all the time, more or less, Stewart further testified that the air did not circulate at the face of the coal and there were no danger marks around the curtain nor at the face of the coal; also that about midnight he burned out the gas in this entry. Between that time and 3:45 A.M. when the explosion occurred, the mine examiner as he states, examined this entry and found no gas but he had with him no

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the entrance of the building. The air was thick with the scent of old wood and the faint, distant sound of a clock tower. I had heard that the place was haunted, but I never believed it until now. The door was open, and I stepped inside. The interior was dimly lit, with the light from the windows casting long, dark shadows across the floor. I walked down a long, narrow hallway, my footsteps echoing off the walls. At the end of the hallway, I saw a door. I opened it and stepped into a large, empty room. The room was filled with a sense of mystery and intrigue. I walked towards the center of the room, my heart pounding in my chest. In the center of the room, I saw a large, ornate table. On the table, there was a small, glowing object. I reached out and touched it. The moment I did, a bright light emanated from the object, and I felt a powerful surge of energy. I knew that I had found something special. I had found the key to the secrets of the past. I had found the truth.

anemometer without which he stated he could not determine the amount of air at the face of the coal. This examiner further testified that he knew this entry at different times had made gas; that if the air did not circulate at the face of the coal when gas was generating it would accumulate there; that the undercutting of the coal and the boring of the holes would liberate the gas if there was any in that particular region, and that the undercutting had not been done nor the holes bored at the time he was in these entries. He further testified that he had noticed a hole in the curtain in the second cross cut; that the hole extended the full length of the curtain, that the curtain was in that condition for two or three mornings before that time; that he knew a hole of that kind in that place would short circuit ~~at~~ the air and prevent the proper amount of air circulating at the face of the coal and that he told the mine manager of this condition either one or two days before the accident. The examiner gave his reason for not marking this curtain as unsafe that "the only thing we mark on is where there is a bad roof in a place or gas". Other witnesses testified as to the hole or tear in this curtain and there appears to be no doubt that such condition had existed for several days. This was clearly such a dangerous condition as under the statute should have been marked by the examiner. The Supreme Court in the case of Mengelkamp v. Consolidated Coal Co., 259 Ill. 305, said, "We have held that the words 'any dangerous condition' in the ~~gas~~ mining act apply to dangerous conditions in the track, the road bed or the sides of the entry, and that they include any dangerous condition which may exist in the coal mine which endanger the life, limb or health of men working in the mine, whether such conditions are of a permanent

character due to faulty construction or of a temporary character due to operation". To the same effect are the cases of Hertens v. Southern Coal Co., 235 Ill. 540 and Dunham v. Black Diamond Coal Co., 239 Ill. 457.

On behalf of plaintiffs in error, a witness, Meyers testified he was present in the fourth entry at the time of the accident and that the explosion was caused by defendant in error striking the cartridge with the steel end of a tamper and the fact that this witness's hair and eyebrows were shinged tends to prove that he was in the near vicinity at the time of the explosion. On the other hand two witnesses testified Meyers said in their presence that at the time the accident happened he was back in a car asleep and that he did not know how it occurred. It is not clear from the proof whether the car referred to was in the first or second cross cut. If in the first cross cut it was about seventy feet from the place of the explosion or if in the second cross cut about one hundred and thirty feet. Both defendant in error and Stewart denied that Meyers was in the entry at the time of the explosion. The testimony of Meyers is weakened somewhat by proof that it was nearly two hours after the accident before he brought help to plaintiff in error and Stewart.

It was the province of the jury to determine the credibility of the witnesses and we are not disposed to question the conclusion reached by them. As the facts supported the verdict of the jury and no other question is presented for our determination, the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported in full.

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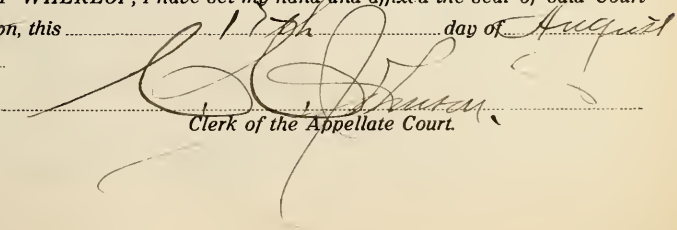
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th day of August A. D. 1918


Clerk of the Appellate Court.

4126

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 169

THOMAS E. PASLEY, Sheriff.

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The Farmers National Bank of
Allendale, Defendant in Error

ERROR TO
~~APPEAL FROM~~

vs.

Circuit COURT

No. 24

March Term, 1918.

Wabash COUNTY

Melchoir Leipold et al,
Plaintiffs in Error

TRIAL JUDGE

HON. J. C. EAGLETON

March Term, A. D. 1918.

| | | |
|------------------------------|---|------------------|
| The Farmers National Bank of | } | |
| Allendale, | | |
| Defendant in Error | | |
| v. | | Error to Wabash. |
| Melchoir Leipold, et al, | | |
| Plaintiffs in Error. | } | |

Opinion by Higbee, J.

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This was an action of assumpsit in the circuit court of Wabash county to the November term, A.D.1915, in which The Farmers National Bank of Allendale was plaintiff, and George S. Clarke and Melchoir Leipold were defendants.

The declaration was as follows: "The Farmers National Bank of Allendale, a corporation by Kolb and White, its attorneys, complains of Melchoir Leipold and George S. Clarke, defendants of a plea of trespass on the cases on promises:

For that whereas the said defendant, Melchoir Leipold, on the 28th day of February, 1914, in the county aforesaid, made his promissory note and delivered the same to said defendant George S. Clarke, and thereby then and there promised to pay four months after date thereof, to the order of the said George S. Clarke at the American National Bank in Mount Carmel, Illinois, the sum of two thousand dollars (\$2,000), for value received, with interest on the said sum, from the date of the said note, at the rate of seven per cent per annum; and the said George S. Clarke

thereupon then and there, to wit, at the time and place first aforesaid, assigned the said note, by indorsement thereon under his hand, to the said plaintiff; by means whereof the defendants then and there became liable to pay the plaintiff the amount of the said note, according to the tenor and effect thereof; and being so liable the defendants, in consideration thereof, then and there promised the plaintiff to pay it the said amount, according to the tenor and effect of the said note.

Yet, although the day of payment in the said note specified has elapsed, the defendants have not paid to the plaintiff the amount of said note, or any part thereof, except the sum of nine hundred thirty five dollars (\$935.00) on the principal of said note, and the interest accrued thereon to the date of September first, 1915, and although often requested to pay the balance due on said note, the said defendants have wholly neglected and refused to pay the same--to the damage of the plaintiff of fifteen hundred dollars (\$1,500) and therefore it brings its suit, etc." The following copy of a promissory note was also filed with the declaration.

'No. 160. Mt.Carmel, Ill., Feby., 28th, 1914. \$2000.00

On or before four months after date, for value received, we or either of us promise to pay to the order of Geo.S. Clarke, the sum of two thousand 00/100 Dollars.

Payable at ~~AMERICAN~~ NATIONAL BANK, MT.CARMEIL, ILL.

And to secure the payment of the said amount, we hereby authorize and empower any attorney at law of the state of Illinois to appear before any court of record, in term time, or in vacation, at any time hereafter and confess judgment for the above mentioned sum and seven per cent from date and ten per cent of the face of this note as attorney fee, and to release all errors, waive all proceedings in the nature of a stay of execution, appeal or petition in error.

thereupon then and there, to wit, at the time and place first
 aforesaid, assigned the said note, by instrument of transfer
 under his hand, to the said plaintiff; by means whereof the
 defendant then and there became liable to pay the plaintiff
 the amount of the said note, according to the tenor and ef-
 fect thereof; and being so liable the defendant, on considera-
 tion hereof, then and there promised the plaintiff to pay
 it the said amount, according to the tenor and effect of
 the said note.

Yet, although the day of payment in the said note
 specified has elapsed, the defendant have not paid to the
 plaintiff the amount of said note, or any part thereof, ex-
 cept the sum of nine hundred thirty five dollars (\$935.00) on
 the principal of said note, and the interest so paid between
 to the date of payment first, 1919, and thenceforth after the
 payment to pay the balance due on said note, the said de-
 fendant have wholly neglected and refused to pay the same--
 to the damage of the plaintiff of fifteen hundred dollars
 (\$1,500) and therefore it finds the said note
 following copy of a promissory note was also filed with the
 defendant.

Know all men by these presents, that I, the said
 defendant, for and in consideration of the sum of one thousand
 no other of us promises to pay to the order of plaintiff
 the sum of two thousand (\$2,000) Dollars.

And to secure the payment of the said amount, we hereby
 authorize and empower any attorney at law of the State of
 Illinois to execute and file with the clerk of the court
 or in vacation, at any time hereafter and before judgment
 for the above mentioned sum and seven per cent thereon and
 for the costs of this note an attorney fees, and
 to release all errors, claims and proceedings in the nature of
 a writ of execution, process or decision in error.

The endorseers, signers and guarantors severally waive presentment for payment, protest or notice of protest and notice of non-payment of this note, and diligence in bringing suit against any party to this note, and sureties agree that time of payment may be extended without notice or other consent.

----- (Seal)

----- Melchoir Leipold ----- (Seal)

----- (Seal)

On the back of the copy of the note was the indorsement of the name George S. Clarke also payments on the principal amounting to \$1005 and of interest to September 1, 1915.

At said term of court, to wit, on November 22, 1915 the following judgment was entered:

"And now on this day come again the parties of this suit, by their attorneys, into open court; the court now, after hearing the evidence offered finds the amount of principal and interest due on the note to be \$1,081.83. Whereupon the court enters judgment on finding in favor of the plaintiff and against the defendants, for the sum of \$1081.83 and costs of suit".

George S. Clarke one of the defendants bring the case into this court by writ of error. Two questions are raised by the assignment of error and argument in this case, viz: was the declaration sufficient to support the judgment, and was the judgment in proper form?

The record in this case and the questions raised are substantially the same as in the case of Keen v. Melchoir Leipold, George S. Clarke (the defendants in this case) and another. What was said in the opinion filed at this term in that case applies equally to this case and by the same reasoning the judgment in this case must be affirmed.

Judgment affirmed.

Not to be reported in full.

The evidence, however, is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged.

On the basis of the facts and circumstances of the case, the court finds that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged.

It is the court's duty to ensure that the defendant is treated fairly and that the evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged.

The court finds that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged.

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The court finds that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged. The evidence is not sufficient to establish that the defendant is guilty of the crime charged.

Not to be repeated in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of August
A. D. 191.....


Clerk of the Appellate Court.



4128

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 175

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

| | | |
|-------------------------------------|---|-------------------------|
| Louis H. Gieseman, | } | ERROR TO
APPEAL FROM |
| Appellee | | |
| | | |
| | | |
| | } | Circuit COURT |
| vs. | | |
| No. 30. | | |
| March Term, 1918. | | |
| | } | Madison COUNTY |
| | | |
| Illinois Terminal Railroad Company, | | |
| Appellant | | |

TRIAL JUDGE

HON. LOUIS BERNREUTER

March Term, A. D. 1918.

Louis H. Gieseman,

Appellee

v.

Illinois Terminal Railroad Company,

Appellant

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}
} Appeal from Madison.
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Opinion by Higbee, J.

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This is an appeal by the Illinois Terminal Railroad Company, from a judgment recovered against it by Louis H. Gieseman in the circuit court of Madison county, for the sum of \$975.

The first of the two counts of the declaration alleged that on August 20, 1915, appellee was the owner and in possession of a farm containing 240 acres of land in Madison county, Illinois; that prior to said date, appellant built its railroad across Cahokia creek valley west of and down stream from appellee's farm; that in doing so said appellant filled up and totally closed the natural channel of Cahokia creek where it was crossed by said railroad and constructed a solid embankment across the same and entirely closed the former natural channel of said creek; that said appellant dug an artificial channel for said creek about 400 feet south and east of the former natural channel; that said appellant negligently constructed and left as the sole channel or opening in said embankment for all the waters coming down said valley, a concrete opening of wholly insufficient size and width; that on said date heavy rain

March 1911, A. C. 1911.

James H. O'Connell,
Appellee
vs.
Illinois Terminal Railroad Company,
Appellant

Opinion of the Court.

This is an appeal by the Illinois Terminal Railroad Company, from a judgment recovered against it by James H. O'Connell in the Circuit Court of Madison County, for the sum of \$1000.

The first of the two counts of the declaration alleged that on August 20, 1911, appellee was the owner and in possession of a tract containing 140 acres of land in Madison County, Illinois; that prior to said date, appellee built the railroad across said tract, and that he was then etched from appellee's tract; that he being so etched, appellee failed to and actually etched the railroad across the tract, and thereby constructed a solid embankment across the road and thereby closed the former natural channel of said stream; that said appellee dug an artificial channel for said stream about 100 feet north and west of the former natural channel; that said appellee unlawfully constructed and left on the same channel of water in said embankment for all the water coming down said valley, a concrete dam of masonry in- sufficient to and which had on said date heavy rain

storms occurred and the waters naturally flowing down said creek or valley were obstructed and prevented from flowing away by said embankment and on account thereof, said waters accumulated and flowed against said embankment to the depth of 15 feet and were held back up stream upon appellee's lands and flooded, damaged and destroyed a large amount of his farm crops, to wit, 40 acres of blue grass pasture, 10 acres of hay, 30 acres of growing corn, 20 acres of wheat in shock, 20 acres of clover, 7 acres of corn and also destroyed a large amount of fencing. The second count contains substantially the same general averments as the first, but alleges that the damages complained of were occasioned by heavy rain storms which occurred on August 13, 1916 and that said damages consisted of the destruction of 40 acres of blue grass pasture and 42 acres of growing corn.

To this declaration appellant filed the general issue and three special pleas, averring in the first that in the construction of its work, due care and diligence was used to avoid obstruction and interference with the natural flow of the water in Cahokia creek valley, and for that purpose certain culverts, openings and bridges were constructed; that in doing said work, appellant created a permanent and lawful structure, so that any damages, if damage was caused thereby, was a permanent damage and injury to said land on the 20th day of September, 1911 and that therefore the causes of action mentioned in the declaration did not accrue within five years next before the commencement of the suit. The second was the usual plea of the statute of limitations, alleging that appellee's cause of action did not accrue at any time within five years

[illegible]

before the bringing of the suit and the third relied on the alleged fact that the injury was permanent at the time of the construction of the work complained of and was in many respects similar to the first.

The pleadings and the evidence in this case are in all important respects similar to the same in the cases of Albert Drda, Henry F.O.Dettmer and W.G.Nivins against the same company which is appellant herein which cases opinions were filed by this court at the March term, 1918. The opinions in those cases to which reference is made fully express our views concerning the general questions arising upon the law and the evidence in this case, as well as in the several cases to which they particularly apply.

In accordance with our views as expressed in said opinions and under the proof adduced in this case, appellee was entitled to a recovery and as the facts seem to justify the amount of damages found by the jury, the verdict should not be disturbed. The judgment of the court below which is in accordance with such verdict will accordingly be affirmed.

Affirmed.

Not to be reported in full.

before the opening of the suit and the trial ended in
the alleged fact that the injury was permanent to the eye
of the condition of the work involved in the case is
very serious and the trial is the trial.

The findings and the evidence in this case are
in all respects similar to the case in the case
of *Atkins v. State*, *Atkins v. State* and *Atkins v. State*
the same evidence which is sufficient to prove that
opinion was filed by the court in the case, *Atkins*.
The evidence in these cases is also sufficient to prove
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evidence in the case and the evidence is also sufficient
as in the case of *Atkins v. State* and *Atkins v. State*.

In *Atkins v. State* the evidence is sufficient to prove
opinion and under the facts which in this case, *Atkins*
was entitled to a recovery and as the facts were so clearly
the amount of damages found by the jury, the verdict should
not be disturbed. The judgment of the court should be
in its entirety and the verdict will be affirmed.

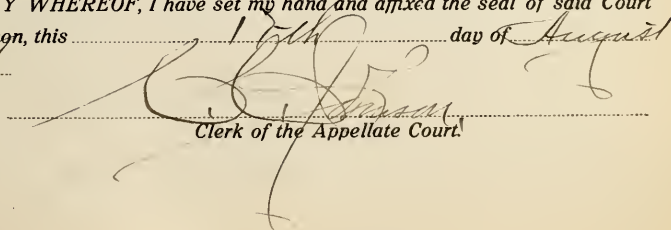
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Witness.

Not to be written in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th day of August A. D. 1910


Clerk of the Appellate Court



4129

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 176

THOMAS E. PASLEY, Sheriff.

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Elizabeth Poland et al,

Appellees

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 48.

March Term, 1918.

Fayette COUNTY

Supreme Tribe of Ben Hur,

Appellant

TRIAL JUDGE

HON. J. C. MC BRIDE

March Term, A. D. 1918.

| | | |
|---------------------------|---|----------------------|
| Elizabeth Poland, et al, |) | |
| Appellees |) | |
| v. |) | Appeal from Fayette. |
| Supreme Tribe of Ben Hur, |) | |
| Appellant. |) | |

Opinion by Higbee, J.

---oOo---

This suit was brought to the August, 1916, term of the circuit court of Fayette county, by Elizabeth Poland and John H. Sperry to recover on a life insurance policy for \$1000 issued by the Supreme Tribe of Ben Hur to Theodore J. Sperry, in which plaintiffs were named as beneficiaries.

The declaration consisted of one count and is in the usual form in such cases. To this declaration a plea of general issue and seven special pleas were filed. Demurrer was sustained to the first, second, fourth and seventh special pleas and the third special plea was withdrawn. Appellant elected to stand by the fourth special plea and amended the seventh. The fifth special plea sets up that the certificate of beneficial membership sued upon provided that the amount thereof should be payable only upon condition that such beneficial member should have in every way complied with the laws, rules and regulations of the association then in force or which thereafter might at any time be adopted. Section 101 of the by-laws which was set out in full is in part as follows: "No benefit shall be paid -----

(3) an account, or in consequence of or as a result of the

intemperate use of intoxicating liquors----- (5) or on account of or in consequence of, or as a result of the violation by any such member of any ordinance of any city, or town, or of any law, either civil or criminal, of any state, territory, province or country in which such member may be, which violation of ordinance or law is the proximate cause of such death or disability-----". The plea then avers that Sperry's death occurred on account of, in consequence of, or as a result of the intemperate use of intoxicating liquors by him, and that on the twenty-eighth day of January, 1916 he intemperately used intoxicating liquors, and as a result of such use, died on January 28th, or the day following, and therefore no benefit was payable under said certificate. The sixth special plea set forth the following provision of said section 101: "No benefit shall be paid on account of the death of a member which death occurred on account of or in consequence, or as the result of the intemperate use of intoxicating liquor" and alleged that Sperry's death occurred on account of or in consequence of or as the result of the intemperate use of intoxicating liquors by him, and that therefore no benefit was payable on account of his death to the plaintiffs. The seventh special plea which is somewhat similar to the fifth, set out section 101 of the by-laws of the association and averred that the death of Sperry followed a violation of the statutes providing that any intoxicated person found in a street, highway or other public place should be fined, in this that Sperry became and was intoxicated upon the streets of the city of Ramsey, and upon the highways of Payette county, and his death would not have occurred except for the violation of such statute, and that, therefore, no benefit

[illegible]

is payable on account of his death.

The trial resulted in a verdict in favor of plaintiffs for \$1000, the face of the policy, and the defendant has appealed from the judgment rendered on that verdict. Appellant is a fraternal beneficial association operating under the lodge system and writing mutual insurance on the assessment plan. The local lodges are known as "courts" and Theodore J. Sperry was a member of the court located at Ramsey, Illinois. On January 28, 1916, the insured was in Ramsey and about ten o'clock A.M. voted at an election there being held. He did not return to his home which was about a mile north of Ramsey and parties who went in search of him that night failed to find him, but did find his cap on a wire cross fence about half way between Ramsey and his home. His body was discovered next morning about three hundred yards from the place where his cap had been found. There was some proof tending to show that a small bottle of whisky was found on or near the body. An inquest was held and a coroner's jury returned a verdict finding the deceased came to his death from "exposure by being under the influence of alcohol". A certified copy of this verdict was attached to the proofs of death furnished appellant by appellees.

The first contention of appellant is that the proof showed deceased came to his death as a result of the intemperate use of intoxicating liquor, which if true, constituted a violation of a condition of the policy and would prevent a recovery on the same. The burden of proof was upon appellant to show that the deceased did so come to his death in order that it might avail itself of this defense. Knights Templars' Indemnity Co. v. Crayton, 209 Ill.550;

in payable on account of his death.

The trial resulted in a verdict in favor of

plaintiff for \$100,000, the sum of the property, and the

defendant was ordered to pay the balance of the

property. The plaintiff is a resident of the

defendant's home. The plaintiff is a resident of the

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Supreme Tent Knights of Maccabees, v. Stensland, 206 Id.124. Nine witnesses in behalf of appellees testified they saw the deceased various times between ten thirty and twelve o'clock on the forenoon of January 28 and he did not appear to them to be intoxicated. Some of these witnesses also testified as did several others, that he was not in the habit of becoming intoxicated so far as they knew. As against this evidence one witness for appellant testified to taking a drink with the deceased about eleven o'clock in the morning of January 28, out of a six or eight ounce bottle which was about half full after they drank out of it. Another testified to finding with the body of deceased a small bottle of something that looked like whiskey. Still another testified to seeing deceased during the noon hour of that day reeling and stumbling around and he "took him to be in an intoxicated condition". Some of the witnesses for appellees saw the deceased as he was leaving town in the direction of his home with a sack upon his back. The question of whether deceased's death was due to the intemperate use of intoxicating liquor, was a question of fact to be determined by the jury and there is evidence in the record fairly tending to support the verdict. Under such circumstances especially in view of the fact that the burden of proof was cast upon appellant the verdict of the jury should not be disregarded. Rice v. Warner Hotel Co., 201 Ill.App.530. 7

Appellant also urges as error, the admission of evidence as to the deceased's habits of using intoxicating liquors insisting that the sole question was whether deceased came to his death by reason of the intemperate use of intoxicating liquors on the 28th day of January, 1916. While the probative force of this evidence may be questioned d

it was not error to admit it. The fact that the deceased had not been formerly addicted to the intemperate use of intoxicating liquor, would tend to show that he was less likely to indulge in its intemperate use on January 28. It would also appear to have been particularly admissible to meet the allegations contained in appellants sixth plea, which charges generally that the death of Sperry was the result of the intemperate use of intoxicating liquors by him. Counsel for appellant also insists that the first and second instructions given for appellees were erroneous in that they advised the jury that the burden rested upon appellant to prove that the deceased came to his death by reason of the intemperate use of intoxicating liquor. This is a correct statement of the law as laid down by the cases of *Knights Templars Indemnity Co. v. Crayton* and *Supreme Tent Knights of Maccabees of the World v. Stensland*, supra. It is insisted by counsel for appellant however, that this burden shifted to appellees, when they introduced in evidence the proofs of death which they had submitted to appellant and which contained the verdict of the coroner's jury that the deceased came to his death "from exposure by being under the influence of alcohol". The cases last referred to expressly hold the fact that the proofs of death in those cases tended to show that the death was suicidal did not change the rule or shift the burden. It only was necessary for appellees in order to make out a case under their declaration to show that they had submitted to appellant proofs of death and the fact that these proofs tended to show that death resulted from the intemperate use of intoxicating liquor, did not change the rule or shift the burden in this case. Appellant is not in any position, however, to raise

[illegible]

this question for the reason that its instruction Numbered 3A contained in substance the same proposition of law. A party cannot complain of the giving of an instruction where the same principle is embodied in an instruction given at his own instance. Fox v. Chicago & Alton R.R.Co. 188 Ill. App.11. The refusal of the court to give three instructions offered by appellant is also assigned as error. These instructions, however, so far as proper, were fully covered by other instructions given by appellant and it was not reversible error to refuse them. No sufficient reason appears from the record for reversing the judgment in this case and the same will accordingly be affirmed.

Affirmed.

Justice McBride took no part in consideration & decision of this case in this Court.

Not to be reported in full.

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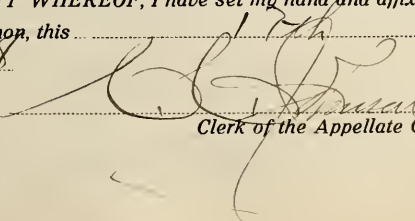
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of this case in the report.

Not to be reported in the report.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of August
A. D. 191.....


Clerk of the Appellate Court.



4132

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

211 I.A. 194

THOMAS E. PASLEY, Sheriff.

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Peerless Pattern Company,

Appellant

~~ERROR TO~~

APPEAL FROM

vs.

County COURT

No. 17

March Term, 1918.

Madison COUNTY

Silverbloom Dry Goods Co.,

Appellee

TRIAL JUDGE

HON. HENRY B. EATON

Term No. 17.

In the Appellate Court,

Agenda No.3.

Fourth District.

March Term A. D. 1918.

Peerless Pattern Company,
Appellant.

vs.

Silverbloom Dry Goods Co.,
Appellee.

}
} Appeal from the county court
} of Madison County.

McLride, J.

On the first day of August 1910 the appellee executed a written order and delivered the same to appellant, which was accepted by appellant, and provided for the shipping by appellant to appellee of an assortment of Peerless Patterns for which appellee agreed to pay nine cents for each pattern. It was provided by such contract that the patterns were to be shipped by appellant to appellee from time to time and that such of the patterns as were not sold by appellee were to be returned and were to be credited to appellee at the full purchase price and appellee was to pay for all goods on or before the 10th day of the month following the month of shipment, together with transportation charges. The order contained the following clauses: "Item 7.-This order is to take effect on acceptance by you and to remain in force for a term of five years from the date of first shipment to us and from term to term thereafter unless either party shall give notice of desire to cancel, in writing, within thirty days before the expiration of any term. If such notice is given by us we will continue the agreement for four months thereafter in order to give you an opportunity to transfer the account."

Term No. 17. In the Appellate Court,
 South District,
 March Term A. D. 1907.

Peelless Pattern Company,
 Appellant.
 vs.
 Highland Dry Goods Co.,
 Appellee.

Opinion, J.

On the first day of August 1907 the appellee
 executed a written order and delivered the same to the ap-
 peal, which was accepted by appellee, and provided for the
 shipping by appellee to appellee of an assortment of
 Peelless Patterns for which appellee agreed to pay nine
 cents for each pattern. It was provided by such contract
 that the patterns were to be shipped by appellee to appellee
 from time to time and that such of the patterns as were not
 sold by appellee were to be returned and were to be
 credited to appellee at the full purchase price and ap-
 pee was to pay for all goods on or before the 10th day of
 the month following the month of shipment, together with
 transportation charges. The order contained the following
 clauses: "After V.-This order is to take effect on acceptance
 by you and to remain in force for a term of five years from
 the date of first shipment to me and from year to year
 thereafter unless either party shall give notice of intent
 to cancel, in writing, within thirty days before the ex-
 piration of any term. It is further agreed by us we will
 continue the agreement for four months thereafter in order
 to give you an opportunity to transfer the account."

"Item 8.- When this agreement is terminated, as herein provided, all conditions having been lived up to by us, live patterns in good salable condition may be returned by us at full purchase price in payment of the above mentioned standing debit".

Upon the delivery of this order patterns were shipped by appellant to appellee from time to time and payments made thereon for five years. Prior to the expiration of the contract and in conformity with its terms, the appellee gave appellant notice of the desire to cancel it and would not renew it for another term. The contract, under its terms, was then continued for four months, shipments and payments made as before. Upon the expiration of four months the witness for appellant testified that they packed the patterns on hand in bundles of fifty and had them ready for shipment and wrote appellant asking it where they desired the patterns to be shipped. The only witness examined was Lewis Blumberg, one of the members of the firm of appellee, and he stated that the amount actually due on January 1, 1916 was \$94.73, and that they had patterns on hand that were live and salable patterns and such as appear in appellant's catalogue, sufficient in number to cover that balance; that they notified appellant that the patterns were ready for shipment and asked them to direct where they desired them to be shipped to. The appellant made no reply to this and other letters to the same effect and never made any demand upon the appellee for the payment of the amount claimed due except by the bringing of this suit.

The pleadings in this case consisted of the common counts, to which an affidavit of merits was attached, and a plea of general issue which was not sworn to.

RE, 02 August 1968, TOWNSEND & HILL, loc. 7.8, 10+IN

When we are all together for the purpose of the above mentioned business, we will give you the same information as we have given you in the past.

[illegible]

They received the letter to be signed. The only witness examined was James H. Hines, one of the workers at the time of the strike, and he stated that the amount actually paid on January 1, 1911 was \$4.75, and that the letter on that date was for \$4.75 and that the letter on January 1, 1911 was for \$4.75.

[illegible][illegible]

Upon a hearing of the case the court found the issues for the defendant and rendered judgment against the plaintiff for costs, to reverse which judgment this appeal is prosecuted.

The appellant in its argument relies upon two questions for a reversal of this judgment. The first is, that the trial court should have entered a judgment in its favor because it filed with its declaration an affidavit of merits, and that the appellee failed to file a sworn plea as required by statute.

It is true it appears from the pleadings in this case that the plea of the defendant was not sworn to but the plaintiff and defendant proceeded to trial upon the issue framed upon the declaration and plea as filed. If the appellant had desired to take any benefit of the failure to file a sworn plea it should have moved for judgment or taken proper steps to have stricken the plea from the files but it did not do this. Instead it proceeded to trial upon the pleadings as framed. This question was not made before the trial court and the trial court never had any opportunity to pass upon it and it is too late to make this objection in this court for the first time. We also believe that by going to trial the verification of the plea was waived. Terhune vs. Weston, 69 App., 249; McWilliams vs. Richland, 16 App., 333.

It is next insisted by counsel for appellant that it was the duty of the appellee to return the patterns within a reasonable time after the termination of the contract, and that as about eighteen months had elapsed and appellee had not actually returned the patterns that it was now too late for appellee to take credit therefor and that the title of the goods had vested in the appellee. We agree with the contention of counsel for appellant that it was the duty of the

Upon a hearing of the case the court found the
evidence for the defendant and rendered judgment against the
plaintiff for costs, to be paid by the defendant. This report
is respectfully
submitted.

The applicant in the instant matter was two
months for a reversal of his judgment. The first set,
and the trial court should have entered a judgment in the
favor because it filed with the decision as withdrawn.
and that the parties failed to file a return paper.

[illegible]

1. The plaintiff and defendant proceeded to trial upon the issues framed upon the declaration and also as filed. At the trial, the plaintiff and defendant presented evidence and testimony in support of their respective positions. The jury returned a verdict in favor of the plaintiff and awarded him damages of \$10,000.00.

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When it is too late to make this collection in trial court and the trial court never has any jurisdiction to dissolve as it were. This question was not even before the

to total the verification of the data was universal. The same

It is not in the least a secret that we have been

was the duty of the supplies to return the letters within a reasonable time after the termination of the contract, and that we about winter months had returned and received back not actually returned the portions that it was now too late for supplies to take credit therefor and that the title to the goods had passed in the contract. We agreed with the Government of Canada for a contract that it was the duty of the

appellee to return the goods within a reasonable time after the expiration of the contract under all of the circumstances and conditions surrounding the parties and we think this doctrine is correctly announced in the case of *House vs. Beak et al*, 141 Ill., 290.

The delivery of the goods under this order constitutes, under the decisions of the courts, a "sale or return", which means "a sale with a right on the part of the buyer to return the goods at his option within a reasonable time." Benjamin on Sales, Vol. 2, Sec. 913. *House vs. Beak, et al, supra*.

The only question to be disposed of is, had an unreasonable time elapsed for returning the goods under all the conditions before the suit was brought. It appears from the contract that if the notice to terminate the contract was given by the appellee that then the agreement was to continue for four months thereafter in order to give the appellant an opportunity to transfer the account. It seems to have been in the minds of the contracting parties that if the appellee terminated the contract that the appellant would want to place or transfer the account to some other persons or firms and that they were seeking time in which to make the transfer. At the expiration of the four months the appellee packed the patterns in bundles of fifty each and notified the appellant that the patterns were ready for shipment and asked them where they should ship them. To this appellant made no reply but suffered the goods to remain there without giving any direction as to their shipment. While it may be true as contended for by appellant that it was the duty of the appellee to return the goods, yet under the circumstances it seemed to be in the minds of the parties that the goods were to be transferred to some other person, and under the further condition that the appellant persis-

and under the former position that the defendant never
that the goods were to be transferred to a third person,
the circumstances it seems to be in the line of the parties
was the duty of the parties to return the goods, yet under
while it was to be considered for a sufficient time if
there was any direct or indirect interest in the goods,
and under the former position that the defendant never
that the goods were to be transferred to a third person,
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there was any direct or indirect interest in the goods,

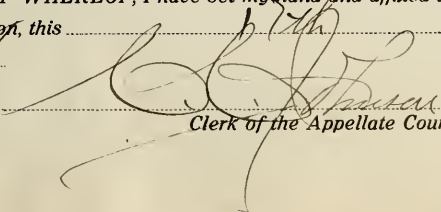
tently refused to advise where the patterns should be sent to, we are unable to say that the court erred in finding that under the conditions the patterns were with-held for an unreasonable length of time. The appellant knew that the goods were ready for shipment, knew that the appellee was ready and willing at any time to ship them and with that knowledge did not even make a demand upon the appellee for payment for the goods. If the demand had been made upon appellee for a payment and they had refused to pay or deliver the goods then a different question might arise. In the case of *House vs. Beak*, *Supra*, the court said, "The buyer may make himself liable to pay the price fixed in the agreement by refusing to return the property upon demand made for it by the seller; but, if the seller does not want the property and makes no demand for it, it is none the less true that the buyer will become liable to pay the price fixed, upon failing to return the property within a reasonable time. In the present case, demands made for the price of the consigned goods, unanswered by either the payment of the money or an offer to return the goods, amounted substantially to such a refusal to surrender on demand, as was held to be sufficient in the *Jones* case".

The only witness introduced was Blumberg, who was fully examined by both appellant and appellee, and it would appear from his testimony that the appellee acted in good faith in with-holding the goods, believing that they were to be transferred to some other account or person engaged in like business, and we think were held for that purpose and that the court was warranted in finding that they had not been held for an unreasonable length of time under the conditions that existed, at least we are unable to say that the court erred in so finding, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th day of August
A. D. 1912


Clerk of the Appellate Court.

NOIN



J. L. OBERMEYER,
Plaintiff in Error,

vs.

WISCONSIN DAIRY FARMS COMPANY,
Incorporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 213

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

This case is here for the second time. Defendant succeeded on the first trial on the theory that a false statement rendered, in which a check for \$369.19 was sent plaintiff as the balance due him, worked an accord and satisfaction. This holding was held to be error and the judgment was reversed and the cause remanded to the Municipal court for a new trial upon the merits. See Obermeyer v. Wisconsin Dairy Farms Co., 19 Ill. App. 568. This adjudication settled the question of accord and satisfaction and we shall confine our review to the merits of the case.

Defendant initiated this transaction by a postal card in which he offered 27½ cents a pound for butter delivered in Chicago, less commission. This was followed by other solicitations at a similar price, relying upon which plaintiff made three shipments of butter to defendant as follows: August 18, 1913, 26 tubs of butter; August 25, 1913, 22 tubs of butter; September 1, 1913, 24 tubs of butter. Defendant advanced upon the first shipment \$260 and a long time thereafter rendered a false statement of account and sent it to plaintiff with a check for \$369.19, which it claimed was the balance due him.

It is admitted that defendant realized \$1237.41 from the sale of plaintiff's butter, and it is insisted by

MINION

1937

DEFENDANT IN ERROR.
 PLAINTIFF IN ERROR.
 OF CHICAGO.
 DEFENDANT IN ERROR.
 PLAINTIFF IN ERROR.
 DEFENDANT IN ERROR.

THE FOLLOWING IS A SUMMARY OF THE FACTS
 PRESENTED TO THE DIVISION OF THE COURT.

This case is here for the second time. Defendant
 requested on the first trial on the theory that a false state-
 ment was made, in which a check for \$369.12 was sent plaintiff
 with the balance due him, without an account and satisfaction.
 The holding was held to be error and the judgment was reversed
 and the cause remanded to the municipal court for a new trial.
 See the record. See Attorney v. Lincoln (1937) 111 Ill. App. 3d.
 This application seeks the reversal of
 the judgment and satisfaction and we shall confine our review to the
 facts of the case.

Defendant initiated this transaction by a postal
 order in which he offered 27 1/2 cents a pound for butter delivered
 in Chicago, less commission. This was followed by other postal
 orders at a similar price, relying upon which plaintiff made
 three shipments of butter to defendant as follows: August 17,
 1937, 25 cubs of butter; August 25, 1937, 25 cubs of butter;
 September 1, 1937, 25 cubs of butter. Defendant advanced upon
 the first shipment \$250 and a long time thereafter rendered a
 false statement of account and sent it to plaintiff with a
 check for \$369.12, which is claimed was the balance due him.
 It is admitted that defendant realized \$107.41
 from the sale of plaintiff's butter, and is in indebted by

plaintiff that defendant is not entitled to any commission but is entitled to credit only for freight and cartage on the three shipments and the two cash payments made, which total \$666.07, leaving due plaintiff \$571.34, on which amount plaintiff claims interest from September 13, 1913.

The ways of defendant in this transaction are to say the least devious. In its defense it insists that it neither bought the butter nor was it the agent of plaintiff for its sale on commission.

The cause was submitted to the court for trial without a jury and there was a finding for defendant and judgment of nil capiat, of which judgment plaintiff seeks this review.

Defendant by its president represented to plaintiff that it had not sold the butter when as a matter of fact it had done so.

In December, 1913, at the request of plaintiff, Hunter, Walton & Co. of Chicago demanded of defendant delivery of the butter to it for plaintiff's account, offering to pay all proper charges thereon. This defendant under various excuses failed to do. In June plaintiff through its attorney made written demand for an accounting, to which defendant responded by rendering a false account, in which was shown gross receipts of \$710.16, which charges for \$260 advanced and \$80.97 other disbursements, and enclosing a check for \$369.19. Notwithstanding this action defendant's president admitted on the trial that the butter was sold for \$1237.41. Defendant's president in answer to interrogatories stated that the gross amount of the sales of the butter was \$1237.41. Among items of charges made against it were the following:

plaintiff's defendant is not entitled to any commission
but is entitled to credit only for freight and cartage on
the three shipments and the two cash payments made, which
total \$665.97, leaving the plaintiff \$571.34, on which
amount plaintiff claims interest from December 15, 1913.
The value of defendant in this transaction was
in any case devices. In its defense it insists that
it neither bought the butter nor was it the agent of plain-
tiff for its sale on commission.
The issue was submitted to the court for trial
without a jury and there was a finding for defendant and
judgment of nil value, of which judgment plaintiff seeks
a new trial.
Defendant by its president represented to plain-
tiff that it had not sold the butter when as a matter of fact
it had done so.
In December, 1913, at the request of plaintiff,
Hunter, Wilson & Co., of Chicago demanded of defendant delivery
of the butter to its for plaintiff's account, offering to pay
all proper charges thereon. This defendant under various ex-
cuses failed to do. In June plaintiff through its attorney
made written demand for an accounting, to which defendant
responded by rendering a false account, in which was shown
gross receipts of \$710.18, when charges for \$280 advanced
and \$50.97 other disbursements, and enclosing a check for
\$259.19. Representing this action defendant's president
admitted on the trial that the butter was sold for \$437.41.
Defendant's president in answer to interrogatories stated
that the gross amount of the sales of the butter was \$437.41,
among items of charges made against it were the following:

| | |
|---|---------|
| Freight and express charges from Jackson, Minnesota, to Chicago, Chicago to Buffalo, Scranton, Richmond, Memphis, Galveston, and from each of these points to buyers..... | \$97.68 |
| Storage at Chicago and each of the points named..... | 41.09 |
| Interest on \$260 advanced at 6 per cent..... | 12.80 |
| Compiling list of retailers in Buffalo territory, 1800 names at \$3.50 per thousand..... | 6.30 |
| Same Scranton, 2300 names..... | 8.05 |
| " Memphis, 1500 names,..... | 5.25 |
| " Richmond, 1200 names,..... | 4.20 |
| " Galveston, 900 names..... | 3.15 |
| Circularizing Buffalo, 1800, 4 times at 50 cents per thousand..... | 36.00. |
| " Scranton, 2300, 4 times at 50 cents per thousand | 46.00 |
| " Memphis, 1500, 4 times at 50 cents per thousand..... | 30.00 |
| " Richmond, 1500, 4 times at 50 cents per thousand..... | 24.00 |
| " Galveston, 900, 4 times at 50 cents per thousand..... | 18.00 |
| Materials, wraps, boxes, tubs, liners, | 31.80 |
| Paper, printing and envelopes for 770 names 4 times..... | 123.20 |
| Postage on circularizing and sales..... | 482.64 |
| Special Commission, 15 per cent..... | 185.62. |

This made the total amount of charges against the butter sold at \$1237.47, \$1208.98. These charges were made in the face of the fact that the butter had been sold soon after it reached Chicago. Defendant afterwards represented to plaintiff that the butter had not been sold but was in cold storage, and stated in a letter of December 12, 1913, that the "warehouse receipts are in our safe and show where this butter is on hand in cold storage." This statement was false when made by defendant and was known by it to be false.

From what we can gather from the record it seems that the trial Judge based his finding upon his conclusion that defendant was not plaintiff's agent. If defendant was not such agent, we are at a loss to discern the relationship between them. However this may be, this is a case of the

fourth class in the Municipal court, and it has been held by this court that a case of the fourth class is what the evidence makes it. Plaintiff was therefore entitled to recover whatever was due him. It is clear from the proofs that the charges made by defendant regarding these 72 tubs of butter were fictitious, for the butter had in fact been disposed of within a few days after its arrival in Chicago. It is also clear that defendant was the agent of plaintiff in this transaction. The law required him as such agent to promptly and honestly account to plaintiff for the proceeds of the butter when sold. This defendant failed to do, but concealed the fact of its sale by various false statements regarding the same. The law requires an honest and fair dealing on the part of the agent with his principal. By making false statements and rendering false accounts, defendant forfeited its claim for commission. Sidway v. American Mortgage Co., 222 Ill. 270; Fish v. Seeberger, 154 *ibid.*, 30; Brannan v. Strauss, 75 *ibid.*, 234; Neal v. Bloomfield, 166 Ill. App. 402.

We find from the evidence that defendant sold plaintiff's butter for \$1237.41; that the freight and cartage thereon, which defendant paid, was \$36.88; that defendant advanced to plaintiff \$260, and subsequently with its false statement sent its check to him for \$369.19; that defendant is entitled to be allowed credits for the foregoing items, which total \$666.07, leaving due from defendant to plaintiff \$571.34, on which plaintiff is entitled to interest at the rate of 5 per cent from September 13, 1913. We therefore reverse the judgment of the Municipal court and enter judgment here in favor of plaintiff for \$704.67.

REVERSED AND JUDGMENT HERE.

learned from the municipal court, and it has been held by this court that a case of the kind is one of the kind which is entitled to recovery. It is clear from the facts that the plaintiff was the owner of the property at the time it was taken. It is also clear that the defendant was the agent of the plaintiff in this transaction. The law requires him as such agent to properly and honestly account to the plaintiff for the proceeds of the property when sold. This defendant failed to do, but concealed the fact of its sale by various false statements regarding the same. The law requires an honest and fair dealing on the part of the agent with his principal. By making false statements and retaining false accounts, defendant forfeited its claim for commission. Idaho v. American

Trust Co., 133 Ill. 370; Fish v. Banker, 134 Ill. 3; Taylor v. Adams, 70 Ill. 334; Peck v. Bloomfield, 188

Ill. App. 40.

As a finding from the evidence that defendant sold plaintiff's property for \$1237.11; that the plaintiff and certain persons, which defendant paid, was \$34.16; that defendant advanced to plaintiff \$380, and subsequently with the same statement sent it over to him for \$389.10; that defendant is entitled to be allowed credits for the foregoing items, which total \$385.07, leaving due from defendant to plaintiff \$751.14, on which plaintiff is entitled to interest at the rate of 8 per cent from September 13, 1913. The balance reverts the judgment of the municipal court and enter judgment here in favor of plaintiff for \$704.67.

244 - 23589

PETER BILLOW,
Appellee,
vs.
ISAAC MILLER,
Appellant.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

211 I.A. 214

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

The cause of action is sufficiently stated in an opinion on a former appeal to this court and as abstracted can be found in 194 Ill. App. 524. The former judgment against two defendants was reversed, as it came to this court on an appeal by both defendants, perfected and prosecuted by one of them only. On this appeal we held that a joint judgment against two defendants, where one only was proved to be liable, was erroneous.

The judgment in this record, rendered on the verdict of a jury, is for \$336.80, and defendant appeals.

The suit after reversal by this court was dismissed as to the defendant Jacob Zeman.

A review of the evidence is not necessary. It is sufficient to say that the proof of plaintiff failed to establish any contract between himself and defendant or any liability of defendant to plaintiff growing out of any dealings between them. The contract involved was in writing between plaintiff and Jacob Zeman. If any liability remains unsettled under that contract, it is the liability of Zeman and not of defendant. As to Zeman's liability, if any, we express no opinion, as he is not a party to the judgment now being reviewed. The debt sued for arises under

OFFICE OF THE CLERK OF THE COURT
COUNTY OF COCO

ISAC HILLY
vs.
ISAC HILLY

211 A. 214

RE. THE EVIDENCE
DELIVERED THE CLERK OF THE COURT.

The case of action is suitably stated in an opinion in a former appeal to this court and we abstained from being found in 194 111. App. 214. The former judgment against two defendants was reversed, as it came to this court on an appeal by both defendants, perfected and passed by one of them only. In this appeal we held that a joint judgment against two defendants, where the only one proved to be liable, was improper.

The judgment in this record, rendered on the verdict of a jury, is for \$25.00, and defendant's expense. The suit after reversal by this court was dismissed as to the defendant Jacob Keman.

A review of the evidence is not necessary. It is sufficient to say that the proof of plaintiff's liability established any contract between himself and defendant or any liability of defendant to plaintiff growing out of any dealing between them. The contract involved was in writing between plaintiff and Jacob Keman. If any liability remains unliquidated under that contract, it is the liability of Keman and not of defendant. As to Keman's liability, if any, we express no opinion, as he is not a party to the judgment now being reviewed. The debt sued for arises under

a written contract with Zeman. It is contended that defendant promised to pay Zeman's indebtedness to plaintiff under that contract. As such an undertaking, if made, was a collateral and not an original one, its not being in writing makes it obnoxious to the Statute of Frauds as an undertaking to pay the debt of another. All this appeared from plaintiff's proofs. At the conclusion of these proofs defendant, in due form, moved for an instructed verdict in his favor, which the court denied. Such denial was reversible error.

For the reasons indicated the judgment of the County Court is reversed with a judgment of nil capiat and for costs against plaintiff both here and below.

REVERSED AND JUDGMENT OF NIL
CAPIAT AND FOR COSTS.

a written contract with Rosen. It is contended that defendant
promised to pay Rosen's indebtedness to plaintiff under that
contract. As such an undertaking, it made, was a collateral
and not an original one, its due being in writing makes it
obnoxious to the Statute of Frauds as an undertaking to pay
the debt of another. All this appeared from plaintiff's
pleads. At the conclusion of Rosen's cross-examination, in
due form, moved for an instructed verdict in his favor,
which the court denied. Such denial was reversible error,
for the reasons indicated in the judgment of the
County Court is reversed with a judgment of nil capias and
for costs against plaintiff both here and below.

REVEREND AND HONORABLE OF THE
COURT AND FOR COSTS.

ANNIE LEE MEDCALF,
Appellee,

vs.

CHICAGO & WESTERN INDIANA
RAILROAD COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

211 I.A. 215

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for \$15,000 entered upon the verdict of a jury in an action for personal injuries.

The accident to plaintiff happened while she was walking upon the right of way of defendant upon its north bound track. Her objective was the tower house in which John H. Shackelford was employed, to whom she was carrying a luncheon for midnight consumption. The time of the accident was about eight o'clock in the evening of July 10, 1913. She was struck by an engine of the Chesapeake & Ohio Railway Company drawing a train of freight cars resulting in the severing of her left arm near the shoulder and the infliction of other injuries. There were joined with defendant in this action the Chesapeake & Ohio Railway Company and the Belt Railway Company of Chicago, who were dismissed out of the action upon the trial.

The original count in the declaration charges that while plaintiff was walking upon the right of way of defendant at its invitation, in the exercise of due care, for the purpose of delivering to an employee of defendant his supper, defendant wilfully, maliciously and recklessly ran her down. Subsequently she filed four additional counts, in the first of which she alleged that defendants maintained a tower house north of the Calumet river alongside the rail-

ALBERT FRANK CROSBY DECEASED

COOK COUNTY,

WILLIAM L. BROWN, JR.,
Appellee,

vs.

CHICAGO & NORTH WESTERN RAILROAD COMPANY,
Appellant.

311 A. 215

IN THE CIRCUIT COURT OF COOK COUNTY

DELIVERED THE VERDICT OF THE COURT.

Defendant appeals from a judgment rendered at

for \$15,000 entered upon the verdict of a jury in an action

for personal injuries.

The plaintiff to the indictment happened while she was

walking upon the right of way of defendant upon its north

bound track. Her objective was the tower house in which John

M. Chackelford was employed, to whom she was carrying a

luncheon for midnight consumption. The time of the accident

was about eight o'clock in the evening of July 10, 1913. She

was struck by an engine of the Chesapeake & Ohio Railway Com-

pany drawing a train of freight cars resulting in the sever-

ing of her left arm near the shoulder and the infliction of

other injuries. There were joined with defendant in this ac-

tion the Chesapeake & Ohio Railway Company and the Belt

Railway Company of Chicago, who were dismissed out of the

action upon the trial.

The original count in the declaration charges

that while plaintiff was walking upon the right of way of

defendant at its invitation, in the exercise of due care,

for the purpose of delivering to an employee of defendant his

luncheon, defendant willfully, maliciously and recklessly ran

her train. Subsequently she filed four additional counts, in

the first of which she alleged that defendant maintained a

tower house north of the Belmont river alongside the rail-

road tracks, which tower house on the day of the accident was in charge of one John H. Shackelford, an employee of defendants, who worked from six o'clock p. m. to six o'clock a. m.; that it was customary for him to have his supper delivered at the tower house at night, all of which was known to and permitted by defendants. She then avers that it was the duty of defendants to provide at that place a safe and suitable manner and method of getting to and from said tower house for employees and persons having business therein, the nonperformance of which duty constituted defendants' negligence.

Further, that on July 10, 1913, while she was walking upon said tracks, for the purpose of delivering his supper to Shackelford, and while proceeding with all due care and caution for her safety, the Chesapeake & Ohio Railway Company by its agents and servants carelessly, negligently, wilfully, wantonly and recklessly ran and drove a certain locomotive engine and train of freight cars thereto attached into, upon, against and over plaintiff, etc.

The second count is similar to the first, and in it it was alleged that it was customary for Shackelford to have his supper delivered to him at night, all of which was known to and permitted by defendants, and that plaintiff was walking upon the tracks by invitation. This count also alleges failure to have a headlight upon the locomotive or to sound a gong, bell or whistle to warn plaintiff.

The third count alleges it was defendants' duty to use ordinary and reasonable care to avoid injury to persons rightfully upon its tracks and right of way; that at the time of the accident she was walking upon the right of way in the exercise of due care and caution for her safety

road tracks, which tower house on the day of the accident was in charge of one John L. Shafter, an employee of defendant, who worked from six o'clock p. m. to six o'clock a. m.; that it was customary for him to have his supper delivered at the tower house at night, all of which was known to and testified by defendant. He then avers that it was the duty of defendant to provide at that place a safe and suitable manner and method of getting to and from said tower house for employees and persons having business therein, the non-performance of which duty constituted defendant's negligence.

Further, that on July 10, 1913, while one was walking upon said tracks, for the purpose of delivering his supper to Shafter, and while proceeding with all due care and caution for her safety, the Chesapeake & Ohio Railway Company by its agents and servants carelessly, negligently, willfully, maliciously and recklessly ran and drove a certain locomotive engine and train of freight cars thereto attached into, upon, against and over plaintiff, etc.

The second count is similar to the first, and in it it was alleged that it was customary for Shafter to have his supper delivered to him at night, all of which was known to and testified by defendant, and that plaintiff was walking upon the tracks by invitation. This count also alleges failure to have a headlight upon the locomotive or to sound a horn, bell or whistle at said plaintiff.

The third count alleges it was defendant's duty to use ordinary and reasonable care to avoid injury to persons rightfully upon the tracks and right of way; that at the time of the accident she was walking upon the right of way in the exercise of her duty and caution for her safety.

for the purpose of delivering to an employee of defendants his supper; and that the defendants, by their servants, wilfully, recklessly and negligently ran, drove, managed and operated a certain locomotive engine so that the same ran over her, etc.

The fourth count was similar to the second in its averments, and in it it was alleged that the Chesapeake & Ohio Railway Company, by its agents, ran a locomotive engine and train of freight cars in a northerly direction in a careless, negligent, wanton, willful and reckless manner upon and against plaintiff, injuring her, etc.

To these several counts defendants interposed pleas of the general issue and a special plea of non-ownership and non-control.

The declaration proceeds upon the theory that plaintiff was a licensee and went upon the railroad tracks upon an implied invitation, and the charge in each count is that defendants wantonly, willfully, recklessly, etc., ran over and injured her. As a licensee the duty which defendant owed plaintiff was simply not to wantonly or willfully injure her and to use reasonable care to avoid injuring her after discovering her to be in peril. This was the limit of defendant's duty. Thompson v. C. C. C. & St. L. Ry. Co., 226 Ill. 542. In I. C. R. R. Co. v. Fisher, 202 *ibid*, 556, the rule regarding such duty is laid down in the following language:

"A railroad company owes no duty to a person walking along its tracks without its invitation, either expressed or implied, except to refrain from wantonly or wilfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril; and it makes no difference in that respect whether he is a trespasser, a mere licensee, or one who is on the tracks by mere sufferance, without objection of the company. One who goes upon a railroad track by permission, or where permission may be implied from the circumstances, may be regarded as having a license, but one who is there by mere

for the purpose of delivering to an employee of defendant his papers; and that the defendant, by their servants, willfully, recklessly and negligently ran, drove, pushed and operated a certain locomotive engine in such a manner as to over her, etc.

The fourth count was similar to the second in its averments, and in it it was alleged that the Chesapeake & Ohio Railway Company, by its agents, ran a locomotive engine and train of freight cars in a westerly direction in a careless, negligent, wilful and reckless manner upon and against plaintiff, injuring her, etc.

To these several counts defendants interposed

pleas of the general issue and a special plea of non-ownership and non-control.

The declaration proceeds upon the theory that

plaintiff was a licensee and went upon the railroad tracks upon an implied invitation, and the charge in each count is that defendants wantonly, willfully, recklessly, etc., ran over and injured her. As a licensee the duty which defendant owed plaintiff was simply not to negligently or willfully injure her and to use reasonable care to avoid injuring her after

discovering her to be in peril. This was the gist of

defendant's duty. Thompson v. C. & O. R. Co., 114 Ky. Co.,

188 Ill. 345. In I. C. & N. R. Co. v. Wagner, 203 Ill. 356,

the rule regarding such duty is laid down in the following language:

"A railroad company owes no duty to a person coming upon its tracks without its invitation, either expressed or implied, except to refrain from wantonly or willfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril; and it owes no diligence in that respect whether he is a trespasser, a bare licensee, or one who is on the tracks by some authority, without objection of the company. One who goes upon a railroad track by permission, or where permission may be implied from the circumstances, may be regarded as having a license, but one who is there by mere

sufferance, is not a licensee and may be a trespasser. In either case there is no duty toward him except to refrain from wantonly or wilfully injuring him. (Illinois Central Railroad Co. v. Godfrey, 71 Ill. 500; Lake Shore & Michigan Southern Ry. Co. v. Bodemen, 139 id. 596; Illinois Central Railroad Co. v. Noble, 142 id. 578; Wabash Railroad Co. v. Jones, 163 id. 167; Illinois Central Railroad Co. v. O'Conner, 189 id. 559.) In Illinois Central Railroad Co. v. Godfrey, supra, no distinction was made between a licensee and a trespasser, but the same rule was applied to both, and it was said, 'A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.' One who has permission or license to travel along the tracks takes it subject to the use of the road without reference to him. The license imposes no obligation to take precautions for his safety or to run trains in any respect different from what they would be run if he was not there. He takes the premises as he finds them, with all the attendant dangers connected with their use, only subject to the limitation that the company shall not inflict upon him wanton or intentional injury."

The result of our decision rests within the rules of law announced in the foregoing quotations and the cases there cited.

The facts relating to the accident which are not controverted are that plaintiff, a resident of Marlowe, Oklahoma, came to Chicago in June, 1913, and visited at the home of John W. Shackleford, of whose wife she was a cousin. Shackleford lived at the time of the accident in a house belonging to defendant, in whose employ he was as a "tower man." This house was near the tracks of defendant in the vicinity of the Calumet drawbridge. Shackleford's duties were performed between the hours of six o'clock p. m. and six a. m. of a continuous working day. The tower house in and from which Shackleford discharged his duties was situate just north of the Calumet river near defendant's tracks and right of way. Plaintiff and her cousin were in the habit of taking to Shackleford at this tower house a luncheon which he ate at midnight. They at times went together and at other times only one of them went. On the east of the right of way there was a road called Torrence avenue and also a well beaten

path on the old right of way to the west of the existing right of way as it existed at the time of the accident. These were accessible to all persons in reaching the tower house from the Shackelford house and its vicinity. There were no eye witnesses to the accident. Plaintiff's narration of the occurrence is in the record uncontradicted and is in substance that about eight o'clock July 10, 1913, she left the Shackelford home to carry a luncheon to Shackelford at the tower house of defendant; that she proceeded from the Shackelford house to a small brick house to the north of it, then went up some steps which led to the embankment of the railroad track and thence down the track on a little footpath; that she was going north walking on the left side of the southbound track; that the path was on the embankment just where the signals were, and on the edge of the ballast; that the path was about a foot wide and continued alongside the rails over to the signals, where it stopped; that she got to the end of the path and saw a train coming on the southbound track near where she was walking; that she crossed both tracks - the north and south tracks - to keep away from the passing train; that she was then east of both tracks; that she walked very slowly and looked back, because she was going to cross back on the other side; that she walked on the east side the distance that a person would walk with rather a long train passing, walking very slowly; that the train took two or three minutes to pass; that there were about forty cars in that train; that just as it had about passed, all but the caboose and a car, she started back over to the other side; that she again looked back south before walking across, but saw nothing but the passing train, nor heard no signal; that she then started across the track; that she crossed the east rail of the east track and was in between

path on the left of the west of the existing 11 ft
 of way as it existed at the time of the accident. There were
 accessible to all persons in reaching the tower house from the
 Shackleford house and its vicinity. There were no other witnesses
 to the accident. A witness's narrative of the occurrence is
 in the report uncontradicted and is in substance that about
 eight o'clock July 10, 1915, she left the Shackleford house to
 carry a luncheon to Shackleford at the tower house of Grand-
 ant; that she proceeded from the Shackleford house to a small
 brick house to the north of it, then went up some steps which
 led to the embankment of the railroad track and thence down
 the track as a little footpath; that she was going north walk-
 ing on the left side of the southbound track; that the path
 was on the embankment just where the signals were, and on the
 edge of the ballast; that the path was about a foot wide and
 continued alongside the rails over to the signals, where it
 stopped; that she got to the end of the path and saw a train
 coming on the southbound track near where she was walking;
 that she crossed both tracks - the north and south tracks -
 to keep away from the passing train; that she was then east
 of both tracks; that she walked very slowly and looked back,
 because she was going to cross back on the east side; that
 she walked on the east side the distance that a person would
 walk with a long train passing, walking very slowly;
 that the train took two or three minutes to pass; that there
 were about forty cars in that train; that just as it had about
 passed, all but the engine and a car, she started back over
 to the other side; that she again looked back north before
 walking across, but saw nothing but the passing train, nor
 heard no signal; that she then started across the track; that
 she crossed the east rail of the east track and was in between

the two rails of the east track and had nearly crossed the track when she was struck by the northbound train; that this was between 25 and 35 feet north of the signals; that she was struck a little to the left side as she was going across when the train struck her, severing her left arm at the shoulder.

The train which struck plaintiff was proceeding slowly - not more than six miles an hour. The train which she stepped aside to avoid was going south; the train which struck her was going north. The southbound train was going quite fast and made much noise, although that it made much smoke is in dispute. Be this as it may, there is no evidence in this record warranting the conclusion that defendant's servants in the running of the train which struck plaintiff acted either willfully or wantonly. The tracks upon which plaintiff was injured were constantly traveled by trains proceeding north and south, there being much traffic passing into and out of Chicago. Several railroads operated their trains over these tracks of defendant. Knowledge of these conditions and of the risk to pedestrians using defendant's right of way was at least imputable to plaintiff, and from her knowledge gained in walking along the right of way to and from the tower house it is but reasonable to say that she had actual notice of such conditions. Whether plaintiff was negligent in not seeing the approaching train, by reason or not of the smoke created by the southbound train, or in suddenly getting in its path, is of no importance, because to whichever of these causes the accident is attributable, no right of recovery can be predicated upon either. While it is clear there were two safe ways in which plaintiff could have reached the tower house on the day of the accident, and which prudence should have led plaintiff to have taken instead of the perilous path which she trod, still

the two rails of the east track and had nearly crossed the track when she was struck by the northbound train; that this was between 25 and 35 feet north of the sidewalk; that she was struck a little to the left side as she was going across when the train struck her, averring her left arm was the shoulder.

The train which struck plaintiff was proceeding

slowly - not more than six miles an hour. The train which she attempted to avoid was going north; the train which struck her was going north. The southbound train was going quite fast and made much noise, although that it made much noise is in dispute. As this as it may, there is no evidence

in this record warranting the conclusion that defendant's servants in the running of the train which struck plaintiff acted either willfully or negligently. The track upon which

plaintiff was injured were constantly traveled by trains proceeding south and north, there being much traffic passing into and out of Chicago. Several railroads operated their trains over these tracks of defendant. Knowledge of these conditions and of the risk to pedestrians using defendant's right of way was at least imputable to plaintiff, and from her

knowledge gained in walking along the right of way to and from the tower house it is but reasonable to say that she had actual notice of such conditions. Whether plaintiff was negligent in not seeing the approaching train, by reason or not of the smoke created by the southbound train, or in unduly relying in its path, is of no importance, because to

whichever of these causes the accident is attributable, no claim of recovery can be predicated upon either. While it is clear there were two safe ways in which plaintiff could have reached the tower house on the day of the accident, and which prudence should have led plaintiff to have

taken instead of the perilous path which she took, still

aside from her negligence in this regard, she being at the most a licensee upon the right of way of defendant, she has no right of action against defendant, under well settled legal principles. Plaintiff in walking along the right of way of defendant assumed all attendant risks with the single exception of wanton or wilful injury at the hands of defendant or its servants, or the lack of reasonable effort to avoid injuring her after it became evident she was in a perilous situation.

Nor did plaintiff's presence as a licensee impose upon defendant the duty of taking any precaution for her safety or of running its trains in any respect differently than they would have been run had she not been there. Even the absence of a headlight, if one were essential, or the failure to give a signal or ring the bell of the engine, would not render defendant liable to a person who was on the tracks by implied invitation as a licensee. Thompson v. C. C. C. & St. I. Ry. Co., supra.

The record lacking proof that plaintiff's injuries were occasioned by the wanton or willful act of defendant or its servants, or that defendant was negligent in not using reasonable diligence to avoid injuring plaintiff after discovering the perilous situation in which she had placed herself, plaintiff is not entitled to recover in this action, and the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

aside from her negligence in this regard, and being at the
 most a licensee upon the right of way of defendant, she
 has no right of action against defendant, under well settled
 legal principles. Plaintiff is seeking relief on the right of
 way of defendant, assuming all attendant risks with the single
 exception of accident or willful injury at the hands of defend-
 ant or its servants, or the lack of reasonable effort to
 avoid injuring her after it became evident she was in a
 perilous situation.

For did plaintiff's presence as a licensee in-
 pose upon defendant the duty of taking any precaution for
 her safety or of turning the train in any respect differ-
 ently than they would have been run had she not been there.
 Even the absence of a headlight, if not were essential, or
 the failure to give a signal or ring the bell of the engine,
 would not render defendant liable to a person who was on the
 tracks by implied invitation as a licensee. Thompson v.

O. & N. R. Co., 114 Cal. 401, 402.

The record further shows that plaintiff's in-
 juries were occasioned by the action of willful act of de-
 fendant or its servants, or that defendant was negligent
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 tiff after discovering the perilous situation in which she
 had placed herself, plaintiff is not entitled to recover in
 this action, and the judgment of the Circuit Court is re-
 versed with a finding of fact.

REVEREND WITH FINDING OF FACT.

409 - 23764

FINDING OF FACT.

The court finds that the defendant was not guilty of any act of negligence charged in the declaration of plaintiff or in any count thereof.

400 - 23764

ENDING OF TEXT.

The court finds that the defendant was not
guilty of any act of negligence charged in the declaration
of plaintiff or in any count thereof.

FRED ALLEN AUTOMOBILE
SUPPLY CO., a corporation,
Appellee,

vs.

H. W. JOHNS-MANVILLE CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 217

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1075.24 in favor of plaintiff entered upon the finding of the court.

The action is upon a written contract between the parties in which Plaintiff agreed to purchase from defendant within twelve months from its date all plaintiff's requirements of "Red Seal Batteries" at prices and upon terms in the contract specified. The contract contains this significant provision - that plaintiff will "devote their best efforts in promoting the sale of the same," meaning the Red Seal batteries in the contract described. The contract provided for certain discounts from scheduled prices above certain quantities delivered and paid for within the contract time for deliveries and payment.

While many points are made for reversal and ingeniously argued with ample citation of supporting authority, we are of the opinion that the whole case rests in our construction of the contract as to what was meant by the provision that defendant would furnish sufficient of the contract commodity to meet the requirements of plaintiff during the year the contract was in force. Plaintiff contends and proved that its requirement for the twelve months period of the contract was 143 barrels more than de-

STATE OF MISSISSIPPI
COUNTY OF JEFFERSON
Attorney at Law

vs.

H. W. JONES-JACKSON CO.,
a corporation,
Appellant.

ON CHARGE
OF CHARGE

211 A. 217

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE ESTATE OF THE DECEASED

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in favor of plaintiff entered upon the finding of the court.

The action is upon a written contract between

the parties in which plaintiff agreed to purchase from de-

fendant within twelve months from the date of plaintiff's

requirements of "Red Seal Batteries" at prices and upon

terms in the contract specified. The contract contained this

stipulation: "Plaintiff will devote their

best efforts in promoting the sale of the same," meaning

the Red Seal batteries in the contract described. The con-

tract provided for certain discounts from scheduled prices

above certain quantities delivered and paid for within the

contract time for deliveries and payment.

While many points are made for reversal and

indignantly argued with ample citation of authority and

thereby, we are of the opinion that the whole case rests in

our construction of the contract as to what was meant by

the provision that defendant would furnish sufficient of

the contract commodity to meet the requirements of plain-

tiff during the year the contract was in force. Plaintiff

contends and proved that its requirement for the twelve

month period of the contract was 145 batteries more than de-

defendant delivered and that demand therefor was made; that plaintiff needed for its requirements these 143 barrels, which, in the course of its business and under its contract, it had sold to its customers, and that the difference between the contract price and the price at which it had sold said 143 barrels of batteries, adding thereto the discounts which it would have been entitled to under the contract, was \$1054.63, with interest at five per cent, which was the basis of the trial court's finding and judgment.

Defendant did furnish plaintiff under the contract 32 barrels of batteries and insisted that these were sufficient to meet all reasonable requirements of plaintiff. Defendant admitted that it refused to sell or deliver more than said 32 barrels to plaintiff. cd

There is no force in the contention that the contract is nudum pactum and void for want of mutuality. Nor is the contract unilateral; it is bilateral and there exists within it the reciprocal obligation on the part of plaintiff to buy and pay for the batteries and upon the part of defendant to furnish the batteries at the contract price within the time limited by the contract. Where a contract is not ambiguous, the intention of the parties cannot be determined by evidence aliunde, but by the language employed in the contract itself. Joliet v. Brewing Co., 254 Ill. 215. 7

We agree with the argument of defendant that the legal inquiry is, "What was the intention of the parties?" We think it clearly apparent from the contract that defendant was to furnish plaintiff with batteries as described in it to meet all plaintiff's requirements for twelve months, as those requirements might materialize during that time with plaintiff devoting its best efforts to promote the sale of the batteries. We find nothing ambiguous in the language used in the contract in this re- 7

defendant delivered and that defendant knew for the fact that
plaintiff needed for the replacement of the batteries
which, in the course of the business and under the contract,
it had sold to the customer, and that the relationship between
the contract price and the price at which it was sold
the battery of defendant, adding thereto the damage which
it would have been entitled to under the contract, was
\$108.00, with interest at five per cent, when was the
basis of the trial court's finding and judgment.

Defendant did further insist that the con-
tract 25 battery of batteries and insisted that these were
sufficient to meet all reasonable requirements of plaintiff.
Defendant insisted that it refused to sell or deliver more
than sold 25 battery to plaintiff.

There is no force in the contention that the
contract is void propter error and void for want of mutuality. Nor
is the contract unilateral; it is bilateral and there exists
mutual obligation on the part of plaintiff
to pay and pay for the batteries and upon the part of defend-
ant to furnish the batteries at the contract price within the
time limited by the contract. Where a contract is not unilat-
eral, the inclusion of the parties cannot be determined by
evidence outside, but by the language employed in the contract
itself. Leitch v. Kroyer Co., 234 Ill. 211.

As agreed with the argument of defendant that the plain-
tiff is, "that was the intention of the parties," we think it
clearly apparent from the contract that defendant was to furnish
plaintiff with batteries as described in it to meet all plaintiff's
requirements for twelve months, as those requirements might
materialize during that time with plaintiff having its best
efforts to promote the sale of the batteries. We find none
the obligation in the language used in the contract in this re-

gard; nothing calling for oral proof to define and make clear. Parsons on Contracts, page 527, well states the principle thus:

"The decision must always depend upon the intention of the parties, to be collected in each particular case from the agreement itself and from the subject-matter to which it relates. It cannot depend on any formal arrangement of the words, but the reason and the sense of the thing, as it is to be collected from the whole contract."

Applying this dicta to the contract in hand, we would say in construing it that defendant was a manufacturer of the kind of batteries set out in the contract; that it desired to sell as many of them as possible in one year at certain prices and under certain conditions, and for that purpose made the contract with plaintiff in which to carry out such purpose, and thereby bound plaintiff to use its best efforts to promote the sale of the batteries. There was no limit to the quantity plaintiff might sell. It was to establish its requirements by procuring as many orders for the batteries as it could by the use of its best efforts; no reference to past sales in the previous year was made; no looking backward, but a going forward for one year to sell all the batteries which it could in the exercise of its best efforts. This plaintiff did, and in effect defendant now complains that plaintiff was too active and used too much effort in making sales. However, in the honest discharge of its duty under the contract, plaintiff ought not to have done less. The contract, as the proof shows, being advantageous to plaintiff, undoubtedly stimulated its energy in making sales. This was a condition it had a right to advantage of. The complaint of defendant is the usual one with sellers on a rising market. At this time the contract became a financial disappointment to defendant. It could sell its wares elsewhere for money in excess of the contract price. Hence defendant's

and; making calling for oral trial to define and make clear.
persons on contracts, made but, will define the trial to time;

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lar case from the agreement itself and from the evi-
dence to which it relates. It cannot depend on any formal
arrangement of the words, but on the reason and the sense
of the thing, as it is to be collected from the whole
context."

Applying this idea to the contract in hand,

we could say in construing it that defendant was a manu-
facturer of the kind of batteries put out in the contract;
that it desired to sell as many of them as possible in one

year at certain prices and under certain conditions, and
for that purpose made the contract with plaintiff in which
to carry out such purpose, and thereby bound plaintiff to
use the best efforts to promote the sale of the batteries.
There was no limit to the quantity plaintiff might sell.

It was to establish its requirements by procuring as many
orders for the batteries as it could by the use of its best

efforts; no reference to past sales in the previous year
was made; no looking backward, but a going forward for one
year to sell all the batteries which it could in the exer-

cise of the best efforts. This plaintiff did, and in effect
defendant now complains that plaintiff was too active and used

too much effort in making sales. However, in the honest dis-
charge of its duty under the contract, plaintiff ought not to

have gone less. The contract, as the proof shows, being ad-
vantageous to plaintiff, undoubtedly attempted its duty in

making sales. This was a condition it had a right to advantage
of. The complaint of defendant is the usual one with sellers

on a rising market. At this time the contract became a financial
disadvantage to defendant. It would sell its sales elsewhere

for money in excess of the contract price. Hence defendant's

default in performance, with the evident intent of taking a chance of escaping liability through legal technicality. The inconsistency of defendant's attitude is disclosed by its offer to prove that in the previous year plaintiff's requirements did not exceed 10 barrels, when it actually delivered 32 barrels under the contract without any hesitation or complaint - a quantity, according to such contention, three times and more in excess of plaintiff's reasonable requirements. After that the only change which occurred was an increase in the value of the batteries under contract. The minds of the parties must be determined from the language of the contract, and the requirements of plaintiff must be construed to mean the reasonable requirements which would result from the activities of plaintiff in making sales which both the letter and the spirit of the contract required. The proof related to orders actually obtained, as we gather from the evidence. The reasons these orders were not filled were twofold - first, defendant's failure to furnish the batteries on request; and, second, the inability of plaintiff to procure them in the market. A verbal order is when proven just as binding as one in writing. It was not necessary for plaintiff to prove the orders by the parties giving them. Defendant if he had doubted the veracity of this proof might have called the persons giving the orders in denial. Plaintiff's evidence as to this was not hearsay. The discounts allowed by the contract were properly proven as elements of damage.

Minnesota Lumber Co. v. Whitebreast Coal Co.,

160 Ill. 85, sustains plaintiff's contention that a contract to supply a commodity sufficient to meet the requirements of

account in performance, with the evident intent of limiting a
 chance of recovery liability through legal technicality.
 The inconsistency of defendant's attitude is illustrated by
 its offer to prove that in the previous year plaintiff's
 requirements did not exceed its capacity, when it actually
 delivered 22 barrels under the contract without any limita-
 tion or explanation - a quantity, according to such calculation,
 three times and more in excess of plaintiff's requirements for
 equipment. After that the only change which occurred was an
 increase in the value of the batteries under contract. The
 value of the parties must be determined from the language of
 the contract, and the requirements of plaintiff must be con-
 sidered to mean the reasonable requirements which would re-
 sult from the activities of plaintiff in making sales which
 both the letter and the spirit of the contract required.
 The proof related to orders actually obtained, as we pointed
 from the witness. The reasons these orders were not filled
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 them. Defendant if he had doubted the veracity of this
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 The discounts allowed by the contract were properly proven
 as elements of damage.

Minnesota Number 22. v. Minneapolis Coal Co.

Jan 11. 05, sustaining plaintiff's contention that a contract
 to supply a quantity sufficient to meet the requirements of

a party is not only not void for want of mutuality, but is enforceable at law. There could be no lack of mutuality under the instant contract, because these requirements were coupled with the condition the plaintiff should use its best efforts to make sales. National Furnace Co. v. Keystone Mfg. Co., 110 *ibid* 427. Such contracts, it is held in Minnesota Lumber Co. case supra, "are not uncommon and we have never understood that they were void."

Where a party partly performs a contract he can not afterwards at his own election avoid its further performance upon the alleged ground of want of mutuality. As said in Taylor v. Scott, 178 Ill. App. 487: "A party to a contract may not perform it, so far as it is beneficial to him, and hide behind its want of mutuality when called upon to perform the part of it that is beneficial to the other party." As applied to the case under review, we find defendant performing the contract without any claim of infirmity in it until the time when its further performance became unprofitable. Then it sought to avoid it. It is too late to avoid after part performance. Miller v. Moffit, 153 *ibid* 1.

There are no reversible errors in procedure or the rulings of the trial Judge regarding the defenses interposed or the evidence admitted or excluded, or in the admeasurement of damages. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

have never understood what that was for."

There is no party plaintiff's complaint as set forth in the
-not stated at his own election, and the defendant has
remained upon the office record of that of plaintiff. As
said in Taylor v. Smith, 198 Ill. App. 487: "A party to a
contract may not perform it, so far as it is beneficial to
him, and hide behind the want of necessity when called upon
to perform the part of it that is beneficial to the other
party." As applied to the case under review, we find
defendant performing the contract without any claim of in-
firmity in it until the time when its further performance
became impracticable. When it became so evident, it is
too late to avoid after part performance. Taylor v. Smith.

[Sd 108]

There are no reversible errors in procedure or the rulings of the trial judge resulting from the evidence introduced or the evidence admitted or excluded, or in the assessment of damages. The judgment of the Municipal Court is therefore affirmed.

CONCLUSIONS

ANTON J. CERMAK for use of
JAMES MOLONEY,
Appellant,

vs.

CABLE PIANO CO., a corporation,
et al.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 219

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against the defendant upon a replevin bond. The trial court entered judgment in favor of the defendant and plaintiff brings the case here by appeal.

The Progressive Club of Chicago on October 31, 1914, attempted to convey a piano to defendant by a chattel mortgage to secure the payment of a debt due the defendant resulting from a sale by defendant of the piano to the Progressive Club. On December 8, 1914, the Progressive Club by chattel mortgage conveyed this piano and other goods and chattels to James Moloney, for whose use the suit is brought by plaintiff, to secure the payment of \$1,800 due him by the Progressive Club.

The Cable Piano Company mortgage was executed by the president of the club and acknowledged by him by his attorney in fact. The Moloney mortgage was executed by the president and secretary of the club and duly acknowledged by them. Both mortgages were recorded in the Recorder's office of Cook County, Illinois. On default in payment of the notes secured by the Moloney mortgage, Moloney took possession of the piano in question and other personal property under his mortgage. While so in possession the Cable Piano Company replevied the piano from him. The

Cable Piano Company did not prosecute this suit and it failed to return the piano on demand under a writ of retorno habendo. Suit was then begun on the replevin bond.

The principal point in controversy between the parties is as to whether the defendant could legally deprive Moloney of possession of the piano, notwithstanding the fact that it is conceded that the mortgage to the defendant was invalid as to persons not parties or privies to it.

In Kennedy Furniture Co. v. Griffin, 194 Ill. App. 530, it was held that a chattel mortgage acknowledged by the mortgagor by attorney in fact was invalid as against a purchaser of the property from the mortgagor, such purchaser not being a party or privy to the mortgage, and that a chattel mortgage must be strictly construed as against those seeking to enforce it, for the reason that it is a creature of the statute, and contrary to the common law. Kimball v. Polakow, 268 Ill. 344.

It is conceded by defendant that Moloney was in possession of the piano at the time of service of the replevin writ. It is insisted on behalf of the defendant that the plaintiff made no proofs of possession or any right to possession in opening his case. The record shows that the property was replevined from Moloney. In opening his case the plaintiff introduced in evidence the affidavit filed in the replevin suit, the writ of replevin issued thereon, the service of the writ and its return and the failure of the defendant to prosecute the suit, the judgment of the court in the replevin suit, and the issuance and service of the writ of retorno habendo.

The affidavit charged that the piano in question was in the possession of Moloney and another person and the return of the writ shows that it was found in the possession

People's Bank Company did not prosecute this suit and is called to return the same on demand under a writ of return of possession. This was taken on the return bond.

The principal point in controversy between the parties is as to whether the defendant could legally acquire title of possession of the piano, notwithstanding the fact that it is conceded that the mortgage to the defendant was invalid as to persons not parties or privies to it.

In Kennedy v. White, 100 Ill. 437, it was held that a chattel mortgage was invalid by the mortgagee by attorney in fact was invalid as against a purchaser of the property from the mortgagor, such purchaser not being a party or privy to the mortgage, and that a chattel mortgage could be strictly construed as against those coming to possess it, for the reason that it is a creature of the statute, and contrary to the common law. Kennedy v. White, 100 Ill. 437.

It is conceded by defendant that plaintiff was in possession of the piano at the time of service of the return writ. It is insisted on behalf of the defendant that the plaintiff made no profits of possession or any right to possession in operating his case. The record shows that the property was retained from Kennedy. In opinion the case the plaintiff is entitled in evidence the plaintiff filed in the return writ. The writ of return issued return, the return of the writ and its return and the failure of the defendant to prosecute the writ, the judgment of the court in the return writ, and the judgment and service of the writ of return.

The plaintiff contends that the piano in question was in the possession of plaintiff and another person and the return of the writ shows that it was found in the possession

of Moloney. The evidence shows that the Moloney mortgage was issued in good faith; that Moloney advanced money to the Progressive Club to relieve its property from the lien of a judgment which had been entered against it. It was executed by the proper officers and the only claim made by defendant against its validity is that the plaintiff did not undertake to prove and did not prove that the execution of the mortgage was duly authorized by the members of the club; and it is contended that the burden of proof rested upon the plaintiff to show that his mortgage was a valid one.

Moloney's possession was taken under a mortgage which was valid upon its face; under such circumstances his right to possession of the property cannot be questioned by one claiming under a mortgage, invalid on its face, as against persons not privies thereto. Moloney being in possession of the property and the legal title thereto having vested in him, it is not important to inquire whether the chattel mortgage under which he got possession was executed with all the formalities required by law. Reebie v. Brackett, 109 Ill. App. 631. Nor do we think that it was incumbent upon him in the first instance to show that in the execution of the mortgage the corporation mortgagor had complied with all the requirements of the law, even if it be conceded that the members of the corporation had not directly authorized the execution of the instrument. Moloney's right to possession of the piano could not be disturbed except by some person claiming and proving a superior right as against him. The defendant had no right to the possession of the property at all.

There was sufficient proof as to the value of the piano taken under the writ. The plaintiff sought to prove the value of the piano by the evidence of certain witnesses,

The evidence shows that the mortgage was
 issued in good faith; that the mortgage was not
 given to satisfy the property from the sale of a judg-
 ment which had been entered against it. It was executed by
 the proper officers and the only claim made by defendant against
 its validity is that the plaintiff did not understand its nature
 and did not know that the execution of the mortgage was duly
 authorized by the members of the club; and it is contended that
 the burden of proof rested upon the plaintiff to show that his
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Defendant's possession was taken under a mortgage
 which was valid upon its face; under such circumstances his
 right to possession of the property cannot be questioned by one
 claiming under a mortgage, invalid on its face, as against per-
 sons not parties thereto. Defendant being in possession of the
 property and the legal title thereto having vested in him, it
 is not important to inquire whether the mortgage was valid
 which he had possession was executed with all the formalities
 required by law. People v. Throckmold, 100 Ill. App. 511. For
 us to hold that it was incumbent upon him in the first in-
 stance to show that in the execution of the mortgage the cor-
 poration existed and complied with all the requirements of
 the law, even if it be conceded that the members of the cor-
 poration had not directly authorized the execution of the in-
 strument. Defendant's right to possession of the land could
 not be disturbed except by some person claiming and proving
 a superior right as against him. The defendant had no right
 to the possession of the property at all.

There was sufficient proof as to the value of
 the land taken under the writ. The plaintiff sought to prove
 the value of the land by the evidence of certain witnesses.

the worth of whose testimony might well be regarded as doubtful. We think, however, that reversible error was not committed in admitting this evidence. The affidavit filed in the replevin suit by the defendant expressly fixed the value of the property at \$500, and while this affidavit is contradicted by evidence of witnesses for the defendant, it is supported by the testimony of witnesses for the plaintiff. While, as urged, the statements contained in the affidavit are, under the authorities, to be regarded as at least prima facie proof of the value of the property in question, (Farson v. Gilbert, 85 Ill. App. 364) we think that taken together with the other evidence in the case, this admission is sufficient to warrant our entering a judgment in the suit in favor of the plaintiff for the sum of \$500, together with attorney's fees, interest and costs.

It is urged that the trial court erred in holding that the affidavit filed in the replevin suit was conclusive on the question of value, and in sustaining objections to evidence offered by the defendant to show the real value of the piano. An examination of the testimony discloses that the trial court did not rule out any evidence offered by the defendant as to the value of the property on the theory that the affidavit was conclusive as against the defendant. The court did refuse to permit a witness who signed the affidavit in question to qualify or modify the statements made by the witness in his affidavit. In this ruling we think the court was correct.

We find from the evidence that plaintiff is entitled to recover in this action \$500.00, the value of the piano, \$95.83, interest on that sum from the time of the taking of the piano under the replevin writ to the date of this judgment, \$50.00 for attorney's fees and \$2.00 for appearance fee

the worth of whose testimony might well be regarded as doubtful. We think, however, that reversible error was not committed in admitting this evidence. The affidavit filed in the return was by the defendant expressly filed the value of the property at \$300, and this affidavit is corroborated by evidence of witnesses for the defendant, it is supported by the testimony of witnesses for the plaintiff. While we urged, the statements contained in the affidavit are, under the circumstances, to be regarded as at least prima facie proof of the value of the property in question, (Parson v. Gilbert, 85 Ill. App. 384) we think that taken together with the other evidence in the case, this admission is sufficient to warrant our entering a judgment in the suit in favor of the plaintiff for the sum of \$500, together with attorney's fees, interest and costs.

It is urged that the trial court erred in holding that the affidavit filed in the return was conclusive on the question of value, and in sustaining objections to evidence offered by the defendant to show the real value of the piano. An examination of the testimony discloses that the trial court did not rule out any evidence offered by the defendant as to the value of the property on the theory that the affidavit was conclusive as against the defendant. The court did refuse to permit a witness who signed the affidavit in question to qualify or modify the statements made by the witness in his affidavit. In this ruling we think the court was correct.

We find from the evidence that plaintiff is entitled to recover in this action \$500.00, the value of the piano, \$95.83, interest on that sum from the time of the taking of the piano under the return writ to the date of this judgment, \$50.00 for attorney's fees and \$2.00 for appearance fee.

in the Municipal court. Harts v. Wendell, 26 Ill. App. 274;
Siegel v. Manchett, 33 ibid, 634; Schott v. Youree, 41 ibid,
476; Hopkins v. Iadd, 35 Ill. 178.

The judgment of the Municipal court will be reversed and judgment entered here in favor of the plaintiff for the sum of \$647.83 with costs here and in the trial court against the defendant.

REVERSED AND JUDGMENT HERE.

in the municipal court. Wright v. Wadell, 22 Ill. App. 344;
Alford v. Lumsbeck, 32 Ill. App. 334; Adams v. Wadell, 31 Ill. App. 330; Hopkins v. Jones, 22 Ill. App. 330.

The judgment of the municipal court will be re-

versed and judgment entered here in favor of the plaintiff.

For the use of \$47.82 with costs here and in the trial

court against the defendant.

REVEREND AND HONORABLE JUDGE.

The defendant, in the above case, is a party to the

same case as the plaintiff, and is a party to the

same case as the plaintiff, and is a party to the

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ANE C. JENSEN,
Appellant,

vs.

CHRISTIAN PETERSON and
AXEL A. BAUER,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 233

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Complainant sought by her bill in equity to obtain a decree declaring null and void a second trust deed, dated December 1, 1915, conveying certain premises to secure the payment of a principal note, with interest thereon, for the sum of \$2,500. The Superior Court of Cook county dismissed complainant's bill for want of equity, and she brings the case here by appeal for review.

Complainant's husband died March 18, 1914.

At the time of his death he was the owner of an equity in the property conveyed by the trust deed. The evidence shows that the premises were not occupied by complainant nor her husband at any time between the dates May 1, 1912, and March 1, 1916. The bill was filed March 9, 1916.

In her bill the complainant charged that shortly after the death of her husband the defendant Peterson represented to her that her deceased husband was indebted to him in the sum of \$2,500, and that she advised Peterson to file his claim against the deceased's estate; that she, complainant, was ignorant and inexperienced in business affairs; that she had little knowledge of the English language and that, due to a long existing friendship between her family and the defendant Peterson, he, Peterson, after the death of her husband, became her confidential adviser in her business affairs; that she placed trust and confidence in him; that he

211 I.A. 233

OF COOK COUNTY.

Appellant,
vs.
CHRISTIAN PETERSON and
JAMES A. PETERSON,
Attorneys.

MR. JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

Complainant sought by her bill to set aside

obtain a decree declaring null and void a second trust deed, dated December 1, 1912, conveying certain premises to secure the payment of a principal note, with interest thereon, for the sum of \$2,500. The superior court of Cook county dismissed complainant's bill for want of equity, and she brings the case here by appeal for review.

Complainant's husband died March 12, 1914. At the time of his death he was the owner of an estate in the property conveyed by the first deed. The evidence shows that the premises were not occupied by complainant nor her husband at any time between the dates May 1, 1912, and March 1, 1914. The bill was filed March 9, 1916.

In her bill the complainant charged that shortly after the death of her husband the defendant Peterson represented to her that her deceased husband was indebted to him in the sum of \$2,500, and that she advised Peterson to file his claim against the deceased's estate; that she, complainant, was ignorant and inexperienced in business affairs; that she had little knowledge of the English language and that, due to a long existing friendship between her family and the defendant Peterson, Mr. Peterson, after the death of her husband, became her confidential adviser in her business affairs; that she placed trust and confidence in him; that he

in her bill the complainant charged that shortly after the death of her husband the defendant Peterson represented to her that her deceased husband was indebted to him in the sum of \$2,500, and that she advised Peterson to file his claim against the deceased's estate; that she, complainant, was ignorant and inexperienced in business affairs; that she had little knowledge of the English language and that, due to a long existing friendship between her family and the defendant Peterson, Mr. Peterson, after the death of her husband, became her confidential adviser in her business affairs; that she placed trust and confidence in him; that he

was experienced in business affairs; that he advised her that it was her duty to pay or to secure the payment of her husband's debts; that if she would secure the payment of the debt due him, by the execution of a trust deed on the premises in question, her homestead interest therein would not be affected and that he would not part with the trust deed or notes; that on the faith of these promises she executed the trust deed and note referred to; that she had received no consideration therefor, and that they constituted a fraud upon her rights. eph

In his answer the defendant, Peterson alleged that at the time the trust deed was executed the deceased's estate and complainant were indebted to him in the sum of \$5,517.78, which sum represented a balance due defendant for hay and feed purchased by complainant and her deceased husband. cd

At and before the time the trust deed and note in question were executed a claim was made by the defendant that the complainant was indebted to him for hay and feed furnished her and her deceased husband, who, at the time of his death, was the owner of record of the premises conveyed by the trust deed.

It appears from the record that if Peterson had filed his claim in the Probate court, and such claim had been allowed, the complainant would have realized, out of the estate of her husband, only her dower rights and her widow's award. On the evidence she was not entitled to a homestead right therein. The complainant was the sole legatee and distributee under the will of her deceased husband, and if Peterson's claim had been allowed against the estate she would have received a sum less than the value of her present equity in the premises. She was, Peterson asserts, jointly interested

was experienced in business affairs; that he advised her that it was not duty to pay or to secure the payment of her husband's debts; that it was her duty to secure the payment of the debt due him, by the execution of a trust deed on the premises in question, her husband's interest therein would not be affected and that he would not part with the trust deed or notes; that on the faith of these promises and executed the trust deed and note referred to; that she had received no consideration therefor, and that they constituted a fraud upon her rights.

In his answer the respondent, William Wilson, stated that at the time the trust deed was executed the husband's estate and complaint were introduced to him in the sum of \$5,517.76, which was represented as balance due respondent for day and feed purchased by complainant and her deceased husband.

As and before the time the trust deed and note in question were executed a claim was made by the respondent that the complainant was indebted to him for day and feed furnished her and her deceased husband, who, at the time of his death, was the owner of record of the premises conveyed by the trust deed.

It appears from the record that if respondent had filed his claim in the probate court, and such claim had been allowed, the complainant would have realized, out of the estate of her husband, only her dower rights and her widow's award. The witness who was not entitled to a widow's right therein. The respondent was the sole legatee and heir-at-law under the will of her deceased husband, and it appears that claim had been allowed against the estate and would have received a sum less than the value of her present equity in the premises. One was, therefore, entitled to the

with her husband in the business conducted by him prior to his death.

There is evidence in the record that both complainant and her husband had on different occasions offered to convey the premises to Peterson in payment of their debt to him. The property in question was worth, at the time of Jensen's death, about \$7,500, subject to a first mortgage given to secure the payment of \$2,500.

It is admitted that the defendant Peterson was an intimate friend of complainant and her husband and that after the death of deceased the defendant had rendered much valuable service to her.

The theory of complainant's bill is that the trust deed and note in question should be set aside for want of consideration and because of fraud in procuring the execution thereof. It is conceded that a considerable sum of money was due defendant at the time of the death of complainant's husband. Defendant, after the death of complainant's husband, continuously represented to her that she was in some measure liable for this indebtedness. Several suggestions were made with reference to adjusting defendant's claim and while she insists that he refused to file the claim against the estate, the defendant says that his failure to file the claim in the Probate Court was due to the request of, and as the result of an understanding with, the complainant.

The chancellor heard the testimony of these witnesses and he was in a much better position to judge of their credibility than are we. It was conceded on the trial that the defendant was honest in his dealing with the complainant. Near the close of the trial the court indicated that he considered that the defendant's conduct was straightforward, and counsel for the complainant responded to this

with her husband in the business conducted by him prior to his death.

There is evidence in the record that both complainant and her husband had no different business offered to convey the property to her in payment of their debt to him. The property in question was worth, at the time of James's death, about \$7,000, subject to a time mortgage given to secure the payment of \$2,500.

It is admitted that the defendant retained an immediate right of complaint and her husband and that after the death of deceased the defendant had retained such valuable services to her.

The theory of complainant's bill is that the first debt had been in question should be set aside for want of consideration and because of fraud in procuring the execution thereof. It is conceded that a considerable sum of money was the defendant at the time of the death of complainant's husband. After the death of complainant's husband, continuously represented to her that she was in some manner liable for this indebtedness. Several suggestions were made and reference to objection defendant's claim and while she insisted that he refused to file the claim against the estate, the defendant says that his failure to file the claim in the probate court was due to the refusal of the estate to do so. The result of an understanding with the complainant.

The complainant heard the testimony of these witnesses and he was in a good better position to judge of their credibility than she was. It was conceded on the trial that the defendant was honest in his dealing with the complainant. Her the close of the trial the court instructed that he considered that the defendant's conduct was satisfactory, and counsel for the complainant responded to this

statement by saying that neither he nor Mrs. Jensen had the least desire to question defendant's honesty. Under the circumstances, it is perfectly clear that the conduct of defendant was in no sense fraudulent and that there was ample consideration for the execution of the trust deed and note in question.

While there is a dispute in the evidence as to the liability of complainant to defendant for the goods sold by him it is not denied that prior to the execution of the trust deed the defendant insisted upon the personal liability of complainant to him, and even though it might be held on a trial of this issue that the complainant was not in fact legally obligated to pay the debt owed to defendant, it is evident that the defendant was sincere in urging his claim against the complainant individually. Walker v. Shephard, 210 Ill. 111, 112.

In Adams v. Grown Coal and Tow Company, 198 Ill. 445, it was held that a compromise of a doubtful right is sufficient to support a promise where there is an absence of fraud and the parties act in good faith.

The complainant was the sole legatee and distributee under the will of her husband, of his estate. No question is made that defendant's claim was not good and valid against the estate. The complainant became, therefore, directly interested in the adjustment of this claim, and we think that the execution of the trust deed and note in question was not against her best interests. In any event, if defendant's failure to file his claim against the estate was due to the request of the complainant, this fact furnished a sufficient consideration under the circumstances for the execution of the trust deed and note. Husband v. Epling, 81 Ill. 172.

...by saying that neither he nor his father had the least desire to question defendant's honesty. Under the circumstances, it is perfectly clear that the conduct of defendant was in no sense fraudulent and that there was no consideration for the execution of the trust deed and note in question.

While there is a dispute as to whether or not the ability of complainant to defendant for her debts said by him it is not denied that prior to the execution of the trust deed the defendant insisted upon the personal liability of complainant to him, and even though it might be said on trial of this issue that the complainant was not in fact actually obligated to pay the debt owed to defendant, it is evident that the defendant was anxious in making his claim against the complainant individually. Miller v. Edwards, 211 Ill. 115.

In Edwards v. Brown Coal and Ice Company, 200 Ill. 485, it was held that a compromise of a doubtful right is sufficient to support a promise where there is an absence of fraud and the parties act in good faith. The complainant was the sole legatee and distributee under the will of her husband, of his estate. No question is made that defendant's claim was not good and valid against the estate. The complainant became, therefore, directly interested in the adjustment of this claim, and we think that the execution of the trust deed and note in question was not against her best interest. In any event, if defendant's failure to file his claim against the estate was due to the request of the complainant, this fact furnished a sufficient consideration under the circumstances for the execution of the trust deed and note. Edwards v. Brown, 211 Ill. 175.

The evidence shows that there was no lack of good faith in the conduct of the defendant Peterson. His conduct did not consist in the wrongful assertion of a claim. In Eyle v. Murphy, 180 Ill. App. 25, it was insisted that where "a party making the claim has no right at all then there is no consideration for the compromises." In answer to this contention, the court said:

"If this proposition is confined to a legal right without reference to an investigation of the facts for the purpose of determining whether such right exists or not, then counsel is quite correct, but if the result is to depend upon what the facts in the particular case develop and no fraud or bad faith is shown to exist, then we think the position assumed is not a correct statement of the law as laid down by the more recent principles announced by our own Supreme Court. If a claimant in the settlement of a controversy obtains a compromise by fraud, duress or where no legal right ever existed for lack of incapacity of the party to sue, or otherwise, or where the matters sought to be compromised are of a criminal or unlawful character, then the consideration for any such compromise, whether the proof of such facts were for or against the claimant, would be unlawful and could not be enforced."

The decree of the Superior Court will be affirmed.

AFFIRMED.

400 - 23745

CARRIE MARTIN,
Appellee,

vs.

THE FARR BROTHERS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

211 I.A. 235

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Carrie Martin, brought suit in the Circuit Court of Cook county against The Farr Brothers Company, a corporation, for damages arising from personal injuries received by her October 6, 1914.

The declaration alleged that the plaintiff, with due care, was walking on 113th street in the city of Chicago, at its intersection with an alley; that the defendants named in the declaration were engaged in paving the alley and that in so doing they negligently left open and unguarded an excavation therein, into which plaintiff stepped and was thereby injured.

The evidence introduced on the trial tended to prove that the City of Chicago had entered into a contract with defendant, The Farr Brothers Company, for curbing, paving, etc., a system of streets, in which was included the alley in question; that the defendant, The Farr Brothers Company, thereafter entered into a contract with one Skoglund for doing the curbing work required under the contract; that in putting in the curbing at the place where the accident occurred a ditch had been dug and an opening created into which the plaintiff stepped while attempting to pass from the sidewalk on the south side of 113th street, across the alley. Skoglund, who was originally made a defendant in the action, was dismissed out of the case on motion of plaintiff during

STATE OF ILLINOIS
COURT OF COMMON PLEAS

THE STATE OF ILLINOIS
vs.
CARLOS MARTIN
Appellant.

211 A. 385

BY JUSTICE JOHN J. LEWIS, JR. OF THE COURT.

Plaintiff, Carlos Martin, brought suit in the Circuit Court of Cook County against the defendant, The State of Illinois, for damages arising from personal injuries received by her October 2, 1914.

The declaration alleges that the plaintiff, with the case, was walking on Fifth street in the city of Chicago, at the intersection with an alley; that the defendant named in the declaration were engaged in paving the alley and that in so doing they negligently left open and unguarded an excavation therein, into which plaintiff stepped and was thereby injured.

The evidence introduced at the trial tended to prove that the City of Chicago had entered into a contract with defendant, The State of Illinois, for paving, etc., a system of streets, in which was included the alley in question; that the defendant, The State of Illinois, thereafter entered into a contract with one (name) for doing the curbing work required under the contract; that in putting in the curbing at the place where the accident occurred a ditch had been dug and an opening created into which the plaintiff stepped while attempting to pass from the sidewalk on the south side of Fifth street, across the alley.

Exhibits, and was originally made a defendant in the action, was introduced out of the name in action of plaintiff during

the trial. The jury brought in a verdict in favor of the plaintiff for the sum of \$1,500. Judgment was entered upon this verdict and the defendant brings the case here by appeal for review.

It is contended that no evidence was heard on the trial which tended to prove the material allegations of the declaration. The negligence charged is that an excavation was negligently permitted to remain in the alley, at its intersection with 113th street, and that this excavation was left unguarded and unprotected and made dangerous for pedestrians who were compelled to use the street and sidewalk, and also that defendant negligently failed to place signal lights about the opening.

There is some conflict in the evidence as to whether an opening had been left in the alley at and just before the time of the accident in question. The evidence introduced by the plaintiff tended to prove that a trench about 15 inches deep and 14 inches wide at the top had been dug in the alley and was left open and unguarded at and before the time plaintiff sustained the injuries she complains of. There is also evidence tending to contradict the testimony of these witnesses and which tended to show that there was no hole in the alley at the point where the accident happened at any time on the day in question. Sufficient evidence was introduced of the existence of the excavation and its unprotected condition to support the verdict of the jury. Witnesses testified that the alley was dark at the time of the accident and that there were no barriers or lights which might serve as a protection or warning to pedestrians crossing the alley at the place in question.

The defendant sublet the curbing work required under his contract to Skoglund, and it may be conceded that

the trial. The jury brought in a verdict in favor of the plaintiff for the sum of \$1,500. Judgment was entered upon this verdict and the defendant brings the case here by appeal for review.

It is contended that no evidence was heard on

the trial which tended to prove the material allegations

of the declaration. The negligence charged is that an

excavation was negligently permitted to remain in the alley,

at its intersection with Fifth Street, and that this excava-

tion was left unguarded and unprotected and made dangerous

for pedestrians who were compelled to use the street and

sidewalk, and also that defendant negligently failed to

place alarm lights about the open pit.

There is some conflict in the evidence as to

whether an opening had been left in the alley at and just

before the time of the accident in question. The evidence

introduced by the plaintiff tended to prove that a trench

about 15 inches deep and 14 inches wide at the top had been

dug in the alley and was left open and unguarded at and be-

fore the time plaintiff sustained the injuries she complains

of. There is also evidence tending to contradict the tes-

timony of these witnesses and which tended to show that there

was no hole in the alley at the point where the accident hap-

pened at any time on the day in question. Sufficient evidence

was introduced of the existence of the excavation and its

unprotected condition to support the verdict of the jury.

Witnesses testified that the alley was dark at the time of

the accident and that there were no barriers or lights which

might serve as a protection or warning to pedestrians cross-

ing the alley at the place in question.

The defendant sought the reversal of the verdict and under his contract to defend, and it may be concluded that

Skoglund did the curbing work in the alley under this contract with the defendant. Under its contract with the City the defendant corporation agreed to "erect and maintain strong and suitable barriers, and, during the night time, such lights as will effectively prevent any accident or harm to life, limb, or property in consequence of such digging up, use or occupancy of said street, highway or public grounds, and the contractor shall be liable for all damages occasioned by or resulting from the digging up, use or occupancy of said street, alley, highway or public grounds." Primarily, under its contract, the duty of protecting pedestrians using the public highway at the point in question rested upon the defendant. Its contract was with a municipal corporation, a state agency existing and created for the protection and in the interest of the people. Its, defendant's, possession of the alley in question was solely for the purpose of properly performing the service required by it under the contract, and as a part of this service it was required to protect the public in the manner provided by the contract. This it failed to do, and it seeks to absolve itself on the theory that it had delegated to another contractor the doing of a part of the work required by the contract. Stated differently, it seeks to be relieved of liability under the so-called "independent contractor rule." We think the contention of defendant is well answered in the case of Chicago B. & I. Co. v. La Mantia, 112 Ill. App. 43, where this court said:

"The statement of facts shows that in its contract with the Sanitary District appellant stipulated it would pay all damages for personal injuries resulting from its wrongful acts or from the wrongful acts of any of its employees. The work to be done under this contract necessarily obstructed and encumbered the public highway and unavoidably rendered that highway unsafe for

Shoeland did the curbing work in the alley under this con-

tract with the defendant. Under the contract with the

city the defendant corporation agreed to "erect and main-

tain strong and suitable barriers, and, during the night

time, such lights as will effectively prevent any acci-

dent or harm to life, limb, or property in consequence of

such lighting up, use or occupancy of said street, high-

way or public grounds, and the contractor shall be liable

for all damages occasioned by or resulting from the dis-

cussing up, use or occupancy of said street, alley, highway

or public grounds." Primarily, under the contract, the

duty of protecting pedestrians using the public highway

at the point in question rested upon the defendant. Its

contract was with a political corporation, a state agency

existing and created for the protection and in the interest

of the people. Its defendant's possession of the alley

in question was solely for the purpose of properly performing

the service required by it under the contract, and as a part

of this service it was required to protect the public in the

danger involved by the contract. This it failed to do, and

it sought to exonerate itself on the theory that it had dele-

gated to another contractor the doing of a part of the work

required by the contract. Stated differently, it seeks to

be relieved of liability under the so-called "indemnity

contractor rule." We think the contention of defendant is

well answered in the case of Chicago E. & I. Co. v. Ia

Exotic, 113 Ill. App. 43, where this court said:

"The statement of facts shows that in its con-
tract with the Sanitary District appellant stipulated it
would pay all damages for personal injuries resulting
from its wrongful acts or from the wrongful acts of any
of its employees. The work to be done under this con-
tract necessarily obstructed and unnumbered the public
highway and unavoidably rendered that highway unsafe for

public travel. In such a case the generally understood doctrine of 'independent contractor' does not apply. The rule which governs is this: The case is to be viewed and the liability is to be determined as it would be if the work had been done by appellant, and not by the subcontractor. We are committed to this rule by the opinion in Met. W. S. Ry. Co. v. Dick, 87 Ill. App. 40. Without further comment we adhere to the rule as there laid down. In so holding we are in accord with the Supreme Court of the United States. (Water Co. v. Ware, 16 Wall. 566.)"

Our attention has not been directed to any decision of the Supreme Court of this State which deals directly with this question. There are, however, substantial reasons why the "independent contractor rule" should not be invocable in cases of this kind. The performance of the repaving and curbing work required under the contract would of necessity render the alley dangerous to pedestrians crossing it in passing along the south side of 113th street. That the parties to the contract recognized this fact is evident by the protective measures provided by it. The subcontractor, Skoglund, was employed by defendant to do the curbing work provided for in the contract, and it is clear that the performance of this work and the tearing up and excavation of the alley would, if the measures provided in the contract for the protection of the public were disregarded, cause the alley at the point where the accident happened to become inherently dangerous and hazardous to pedestrians using it. The law charges the defendant with knowledge of these facts, and it is not permitted under the circumstances to invoke the protection of the "independent contractor rule."

In the Village of Jefferson v. Chapman, 127 Ill. 438, the Supreme Court held that -

"One who authorizes a work which is necessarily dangerous and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury."

public travel. In such a case the generally understood doctrine of 'independent contractor' does not apply. The rule which governs is this: The case is to be viewed and the liability is to be determined as it would be if the work had been done by appellant, and not by the contractor. We are committed to this rule by the opinion in Met. Ry. Co. v. Clark, 87 Ill. App. 40. We cannot further comment we adhere to the rule we there laid down. In so holding we are in accord with the Supreme Court of the United States, (Water Co. v. Price, 11 Wall. 566.)"

Our attention has not been directed to any de-

cision of the Supreme Court of this State which deals di-

rectly with this question. There are, however, substantial

reasons why the "independent contractor rule" should not be

invocable in cases of this kind. The performance of the

repairing and curbing work permitted under the contract would

of necessity render the alley dangerous to pedestrians

crossing it in passing along the south side of 115th street.

That the parties to the contract recognized this fact is

evident by the protective measures provided by it. The

subcontractor, Krogmann, was employed by defendant to do the

curbing work provided for in the contract, and it is clear

that the performance of this work and the tearing up and

excavation of the alley would, if the measures provided in the

contract for the protection of the public were disregarded,

cause the alley at the point where the accident happened to be-

come inherently dangerous and hazardous to pedestrians using

it. The law charges the defendant with knowledge of these

facts, and it is not permitted under the circumstances to

invoke the protection of the "independent contractor rule."

In the Willard of Jefferson v. Chapman, 187 Ill.

438, the Supreme Court held that -

"one who authorizes a work which is necessarily dangerous and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury."

Other questions are raised by the defendant as to the admissibility of evidence and the ruling of the trial court upon instructions, as to which we think no reversible error was committed.

The judgment of the trial court will be affirmed.

AFFIRMED.

Other questions are raised by the defendant as to the admissibility of evidence and the ruling of the trial court upon instructions, as to which we think no reversible error was committed.

The judgment of the trial court will be affirmed.

APPROVED.

The defendant has also raised the question of the admissibility of evidence and the ruling of the trial court upon instructions, as to which we think no reversible error was committed.

The judgment of the trial court will be affirmed.

IT IS ORDERED that the judgment of the trial court be affirmed.

NESEA MELON GROWERS ASSOCIATION,
HENRY and ROBINSON,

Appellants,

vs.

EDWARD BYRNES,

Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

211 I.A. 236

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, Edward Byrnes, an attorney-at-law, represented, as attorney, Nesa Melon Growers Association of Nesa, Arizona, in certain litigation which resulted in a verdict and judgment in favor of the association for the sum of \$24,000, in which judgment Byrnes had an interest under a contingent fee contract.

Defendant was also the legal representative of a large number of cantaloupe growers in California and Colorado, who, through their assignee, one Kunihiro, pressed certain alleged claims against railways and others in the Federal courts in Chicago and in California. About the beginning of the year 1915 an effort was made to settle the litigation last above referred to and a cash offer of \$150,000 appears to have been made to settle the suits begun in the name of Kunihiro. Shortly before the time this offer was made, the petitioners Henry & Robinson, attorneys at law, became interested in assisting the defendant in his effort to prosecute and adjust the claims and law suits which grew out of them and an effort was made to collect the judgment for \$24,000 referred to. Nothing of advantage to defendant seems to have resulted from their employment. Law suits were begun in New York, Pittsburgh, Cincinnati and Chicago, the results of which were in no way beneficial to the defendant or his clients. Necessary and incidental ex-

NEW YORK GROWERS ASSOCIATION,
 HENRY and WILSON,
 Appellants,
 vs.
 EDWARD HYMAN,
 Appellee.

211 A. 236

RECEIVED BY THE CLERK OF THE COURT.

The defendant, Edward Hyman, an attorney-at-law, represented, as attorney, New York Growers Association of New York, in certain litigation which resulted in a verdict and judgment in favor of the association for the sum of \$24,000, in which judgment Hyman had an interest under a contingent fee contract.

Defendant was also the legal representative of a large number of cantaloupe growers in California and Ohio, who, through their attorney, one Louis B. Pressed, certain alleged claims against plaintiff and others in the Federal courts in Chicago and in California. About the beginning of the year 1915 an effort was made to settle the litigation last above referred to and a copy of \$150,000 appears to have been made to settle the suits begun in the name of defendant. Shortly before the time this offer was made, the petitioners Henry A. Robinson, attorneys at law, became interested in assisting the defendant in his effort to prosecute and adjust the claims and law suits which grew out of them and an effort was made to collect the judgment of \$24,000 referred to. Nothing of advantage to defendant seems to have resulted from their employment. Law suits were begun in New York, Pittsburgh, Cincinnati and Chicago, the results of which were in no way beneficial to

penses, which were large, occasioned by these suits, were paid by Byrnes and to some extent by petitioners.

Differences arose between Byrnes and Henry & Robinson, and on different occasions both Henry and Robinson threatened to sever their connections with the several matters and cases in which Byrnes was then interested as attorney.

On November 1, 1915, Byrnes began an attachment suit in the Circuit court of Cook County against his client, Mesa Melon Growers' Association, the National Surety Company being made a party thereto as garnishee. In this litigation Henry & Robinson appeared as attorneys for Byrnes and judgment was entered against the defendant. The garnishee filed an answer in this suit. In November, 1916, the defendant Byrnes moved in court to substitute H. J. Toner as his attorney in this litigation, for Henry & Robinson. This motion was subsequently withdrawn. A motion was thereafter made to amend the proceedings in the case in such manner that it be made to appear therein that the suit was brought by Byrnes for the use of Henry & Robinson. This motion was granted and subsequently vacated by the court, and thereafter Henry & Robinson were permitted to file an intervening petition in the suit. The allegations of the petition were traversed by Byrnes; on a trial of the issues joined a verdict and judgment were entered in favor of the defendant Byrnes, and by this appeal Henry & Robinson seek to reverse this judgment.

The printed brief and argument filed by Henry & Robinson consists of 115 pages, of which 109 pages contain what is practically copies of parts of the record and of the abstract. In view of the long record made on the trial a brief of this sort is of little or no aid to this court.

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Deceased, which were far and away, occasionally by their estate, were paid by Wynnes and to some extent by beneficiaries.

Differences arose between Wynnes and Henry & Robinson, and on different occasions both Henry and Robinson threatened to sever their connections with the several masters and owners in which Wynnes was then interested as attorney.

On November 1, 1915, Wynnes began an attachment suit in the District Court of Cook County against his client, Pass Union Growers' Association, the National Turfety Company being made a party thereto as garnishee. In this litigation Henry & Robinson appeared as attorneys for Wynnes and induced him to enter against the defendant. The garnishee filed an answer in this suit, in November, 1916, the defendant Wynnes moved in court to substitute W. J. Jones as his attorney in this litigation, for Henry & Robinson. This motion was subsequently withdrawn. A motion was thereafter made to amend the proceedings in the case in such manner that it be made to appear therein that the suit was brought by Wynnes for the use of Henry & Robinson. This motion was granted and subsequently vacated by the court, and thereafter Henry & Robinson were permitted to file an intervening petition in the suit. The allegations of the petition were traversed by Wynnes; on a trial of the issues joined a verdict and judgment were entered in favor of the defendant Wynnes, and by this appeal Henry & Robinson seek to reverse this judgment. The printed brief and argument filed by Henry & Robinson consists of 112 pages, of which 102 pages contain what is practically copies of parts of the record and of the statement. In view of the long record made on the trial a brief of this sort is of little or no aid to this court.

We will not consider the point raised as to whether, under the proceedings, the court had the right or power to determine the claim made by Henry & Robinson as set out in their petition, as we think from our examination of the record that the verdict and judgment was, on the evidence, correct. It may be conceded at the outset that one who interpleads in a cause "is simply let in for the purpose of establishing his right to the property or funds in dispute." Glover v. Wells, 40 Ill. App., 350.

We have examined the evidence introduced on the trial as it appears in the abstract of record, and we are convinced that under the evidence the intervening petitioners, Henry & Robinson, were not entitled to the funds sought to be recovered by the defendant from his former client, Mesa Melon Growers' Association. It is quite true that the intervening petitioners performed much service and expended some money in the litigation in connection with which they had been employed, but we are unable to find in the evidence any basis for the claim that their relation with the defendant was such that it should be held that they were entitled to an equitable assignment of any interest which the defendant had in the litigation in question. Long quotations of this evidence appear in the briefs of counsel, covering in all about 100 pages, yet the intervening petitioners have failed to point out just where or how in these long extracts the evidence tends to sustain their contention that they had obtained an assignment of any interest the defendant had in the litigation and matters referred to.

In the argument of petitioners it is insisted that an action at law must be begun in the name of the nominal plaintiff, and that the addition of the name of the beneficial plaintiff is simply to protect his interests as

we will not consider the point raised as to whether, under the proceedings, the court had the right or power to determine the claim made by Henry & Robinson as set out in their petition, as we think from our examination of the record that the verdict and judgment was, on the evidence, correct. It may be conceded at the outset that one who intercedes in a cause is simply set in for the purpose of establishing his right to the property or funds in dispute."

Clover v. Wells, 40 Ill. App. 350.

We have examined the evidence introduced on the trial as it appears in the report of record, and we are convinced that under the evidence the intervening petitioners, Henry & Robinson, were not entitled to the funds sought to be recovered by the defendant from his former client, Jean Leon Gower, Association. It is quite true that the intervening petitioners performed much service and expended some money in the litigation in connection with which they had been employed, but we are unable to find in the evidence any basis for the claim that their retention with the defendant was such that it should be held that they were entitled to an equitable assignment of any interest which the defendant had in the litigation in question. Long quotations of this evidence appear in the briefs of counsel, covering in all about 100 pages, but the intervening petitioners have failed to point out just where or how in these long extracts the evidence tends to establish their contention that they had obtained an assignment of any interest in the litigation and matters referred to. In the argument of petitioners it is insisted that an action of law may be begun in the name of the nominal claimant, and that the addition of the name of the beneficial claimant is simply to protect his interests as

against the nominal plaintiff. This may be conceded. Byrnes was not a mere nominal plaintiff in the litigation begun by him. He brought suit to recover for services rendered by him to his client, and while, in a proper case, it might be held that Byrnes was indebted to the plaintiffs for such aid, if any, as they gave him, this fact in and of itself would not authorize the court to substitute any claim which the petitioners might have against Byrnes for his claim against his client.

It is contended that Byrnes assigned to petitioners his interest in the judgment in favor of the Mesa Melon Growers' Association for the \$24,000 referred to. This claim in part grows out of a conversation had between Byrnes, Henry and Robinson, about October 8, 1915. At this time Henry and Robinson were pressing Byrnes for payment of certain moneys advanced by them and they threatened to withdraw from the litigation in which they had, up to that time, performed certain services. If Henry's version of this conversation be true, it appears that Byrnes was unable to meet the demands then made upon him by petitioners; that he sought to convince them that he would be able to and would pay their claim as soon as he had obtained his interest in the \$24,000 judgment referred to; that they were averse to accepting this suggestion and that it was finally agreed that Byrne's claim for an interest in the judgment should be enforced by the beginning of an attachment suit in his name, and that he, Byrnes, said, "Just consider it your claim now, only commence the suit in my name; I would not want anybody to think I had assigned any claim," and that the petitioners assented to this and the attachment suit was begun. Notwithstanding this

against the medical plaintiff. This may be corrected.
Byrne was not a mere medical plaintiff in the litigation
begun by him. He brought suit to recover for services
rendered by him to his client, and while, in a proper case,
it might be held that Byrne was indebted to the plaintiffs
for such aid, if any, as they gave him, this fact in and
of itself would not authorize the court to substitute any
claim which the petitioners might have against Byrne for
his claim against his client.
It is contended that Byrne assigned to peti-
tioners his interest in the judgment in favor of the bank
National Growers' Association for the \$24,000 referred to.
This claim in fact grew out of a conversation had between
Byrne, Henry and Robinson, about December 8, 1915. At this
time Henry and Robinson were pressing Byrne for payment of
certain moneys advanced by them and they threatened to with-
draw from the litigation in which they had, up to that time,
performed certain services. If Henry's version of this con-
versation be true, it appears that Byrne was unable to meet
the demands then made upon him by petitioners; that he sought
to convince them that he would be able to and would pay their
claim as soon as he had obtained his interest in the \$24,000
judgment referred to; that they were averse to accepting this
suggestion and that it was finally agreed that Byrne's claim
for an interest in the judgment should be enforced by the
petitioners of an attachment suit in his name, and that he,
Byrne, said, "Just consider it your claim now, only announce
the suit in my name; I would not want anyone to think I had
assigned any claim," and that the petitioners assented to
this and the attachment suit was begun. Notwithstanding this

statement of the witness, he followed it by saying that it was agreed that petitioners were to have only one-third of anything they might recover on Byrne's behalf in this suit, and petitioner Robinson testified that Byrnes said, "I will give you half of whatever sum will be realized out of the Mesa Melon Growers' Association case, as a fee, a contingent fee that we were to get out of it, for the prosecution of the case of Byrnes v. Mesa Melon Growers' Association;" that Henry spoke up and said, "No, Ed, I think half will be too much, and we will go into the case on a contingent fee of one-third."

In Cameron v. Boeger, 200 Ill. 84, it was held that -

"Where there is an agreement by a party to pay his attorney a reasonable compensation for his legal services out of the proceeds of litigation, such agreement depending as it does upon the mere responsibility of the employer, does not operate as an equitable assignment of any portion of the fund sought to be recovered in the suit."

Much of the material testimony given by petitioners is directly contradicted by Byrnes and others. Byrnes directly denied the language attributed to him by petitioners, or that he at any time had assigned any part of his interest in the judgment referred to. The jury and court who heard these witnesses were in a much better position than are we to determine their credibility, and we are unable to say that the conclusions reached by the jury and the court on the evidence were erroneous.

Other questions are raised by petitioners as to which we think no reversible error was made.

The judgment of the trial court will be affirmed.

AFFIRMED.

statement of the witness, he followed it by saying that it was agreed that witnesses were to have only one-sided evidence. They might disagree on some points in this case, and perhaps Robinson testified that they said, "I will give you half of whatever was paid for the case, as a fee, a contingency fee that we were to get out of it, for the prosecution of the case of James v. Lee." Robinson said, "I think half will be paid, and we will go into the case on a contingency fee of one-third."

In Case v. Smith, 100 Ill. 44, it was said

that -

"Where there is an agreement by a party to pay his attorney a reasonable compensation for his legal services out of the proceeds of litigation, such agreement does not operate as an implied assignment of any portion of the fund sought to be recovered in the suit."

Each of the material facts given by witnesses is directly contradicted by others and others. It is not possible to believe the statements of any of the witnesses or that he at any time had any part of his interest in the judgment referred to. The jury and court who heard these witnesses were in a most better position than we are to determine their credibility, and we are unable to say that the conclusions reached by the jury and the court in the evidence were erroneous.

Other questions are raised by witnesses as to

which we think no reversible error was made.

The judgment of the trial court will be affirmed.

ATTORNEYS.

PERCY N. LAWRENCE,
Appellant,

vs.

LAYTON O. SHERMAN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

211 I.A. 237

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant by his bill, as amended, sought an injunction against the defendants. To this a general demurrer was filed, which was sustained by the chancellor and an order entered dismissing the bill for want of equity. From this order complainant appeals.

The bill asserts that the defendant Sherman claimed to have invented a valuable process for refining crude oil, and ~~and~~ entered into negotiations with Frederick C. Norris, one of the defendants, who interested the defendants W. E. D. Stokes and Ellis T. Crawford, residents of New York City. Samples of the gasoline produced by the process were sent to Stokes and Crawford, who exhibited these to the complainant, Lawrence, who was a broker in business in New York City. Lawrence represented that he had a client engaged in the refining business who might become a licensee for the use of the process. Stokes and Crawford went to Chicago, and there met Sherman and Norris, and on July 9, 1915, the four of them entered into a contract by which Norris, Crawford, Stokes and Sherman became joint owners of the process, and Stokes and Crawford were authorized to sell or license the same under royalty contracts and pay a broker's commission, except that the right for a 3,000 barrel plant was reserved. The bill asserts that this contract was executed in order to satisfy Lawrence as to the authority of

ALL IN THE CIRCUIT COURT,
CLARK COUNTY.

ERNEST H. LAWRENCE,
Appellant,
vs.
JAMES O. SHAWMAN & al.,
Appellees.

THE JUSTICE HEREBY DENIES THE PRAYER OF THE PETITION.

Complaints by this bill, as amended, against an injunction against the respondents, to this bill, as amended, was filed, which was sustained by the respondent and an order entered dissolving the bill for want of equity. From this order complaint appeals.

The bill asserts that the defendant Shuman claimed to have invented a valuable process for refining crude oil, and entered into negotiations with Frederick C. Morris, one of the respondents, who introduced the defendant W. E. W. Stokes and Ellis Y. Crawford, residents of New York City. Copies of the gasoline produced by the process were sent to Stokes and Crawford, who exhibited these to the complainant, Lawrence, who was a broker in business in New York City. Lawrence represented that he had a client entered in the refining business who might become a licensee for the use of the process. Stokes and Crawford went to Chicago, and there met Sherman and Morris, and on July 3, 1913, the four of them entered into a contract by which Morris, Crawford, Stokes and Sherman became joint owners of the process, and Stokes and Crawford were authorized to sell or license the same under royalty contracts and pay a broker's commission, except that the right for W. E. W. Stokes and Lawrence in order to satisfy Lawrence as to the authority of

Stokes and Crawford, who on returning to New York showed the contract to him and informed him that they were then ready to contract with him. On August 10th an agreement was entered into between Stokes and Crawford, acting for themselves and as agents for Norris and Sherman, parties of the first part, and complainant Lawrence, party of the second part. In this agreement the contract of July 9th was referred to as having theretofore been entered into by the parties of the first part, and a copy of this was annexed to and made a part of the agreement of August 10th. It was asserted that this was done at the request of Lawrence. The August 10th contract also provided that Lawrence should introduce the parties of the first part to a responsible party who would deal as principal for the acquisition of the rights by license or otherwise, to use the process, etc., referred to in the contract of July 9th, upon terms satisfactory to the parties of the first part, and that the parties of the first part were willing to compensate the party of the second part for such introduction. Lawrence agreed to introduce the first parties to a party financially and commercially able to deal as principal, and upon terms satisfactory to the first parties, for the right to use the process upon a royalty basis, with a guaranteed minimum to be fixed by future agreement between the first parties and such licensee, together with satisfactory assurances and guaranties of performance and payment, to be agreed upon thereafter in such contract to be made by the parties so introduced. The first parties agreed that within four months from July 9, 1915, they would not enter into negotiations or contractual relations with the corporation to which they were introduced by Lawrence, without compensating him in case such negotiations resulted in an operative agreement, by

Stokes and Crawford, who on returning to New York showed the contract to him and informed him that they were then ready to contract with him. On August 10th an agreement was entered into between Stokes and Crawford, acting for themselves and as agents for Norris and Lawrence, parties of the first part, and complainant Lawrence, party of the second part. In this agreement the contract of July 9th was referred to as having theretofore been entered into by the parties of the first part, and a copy of this was annexed to and made a part of the agreement of August 10th. It was recited that this was done at the request of Lawrence. The August 10th contract also provided that Lawrence should introduce the parties of the first part to a responsible party who would be principal for the acquisition of the rights by license or otherwise, to use the process, etc., referred to in the contract of July 9th, upon terms satisfactory to the parties of the first part, and that the parties of the first part were willing to compensate the party of the second part for such introduction. Lawrence agreed to introduce the first parties to a party financially and commercially able to deal as principal, and upon terms satisfactory to the first parties, for the right to use the process upon a royalty basis, with a guaranteed minimum to be fixed by future agreement between the first parties and such licensee, together with satisfactory assurances and guarantee of performance and payment, to be agreed upon hereafter in such contract to be made by the parties so introduced. The first parties agreed that within four months from July 9, 1915, they would not enter into negotiations or contractual relations with the corporation to which they were introduced by Lawrence, without consulting him in case such negotiations resulted in an operative agreement.

paying him 20% of the royalties, but the first parties reserved the right to negotiate and do business with other parties without any obligation to pay Lawrence any sum whatever; Lawrence was to receive as compensation for his services 20% of the royalties paid by the licensee to be produced by him - "said payment is to be made only if, as and when received, and not otherwise, by said parties of the first part." It was further agreed that the royalty contract with the licensee should contain suitable provisions with respect to the amount of rate of royalty to be paid, and the time and manner, ascertainment of quantities, the guaranteed minimum, etc., and satisfactory assurances of the financial responsibility of the licensee; also that the agreement should be subject to a demonstration or test under conditions to be set forth in such proposed agreement between the first parties and the licensee. The contract also contained a provision that there was no other or different agreement or understanding between the first parties and the party of the second part than this agreement of August 10th; also that the authority conferred upon Lawrence should not extend beyond September 9, 1915, and that no claim should be made by him against the first parties or any of them for any compensation for his services or efforts unless the same shall have resulted in a final and operative agreement between the parties of the first part and the licensee on or before September 9, 1915, except that in case Lawrence before that time should produce a person or corporation at any time ready, able and willing to enter into such license agreement upon terms satisfactory to the first parties, and the first parties have not theretofore made any binding contract with other parties for the use of said process, the party of the

paying him 50% of the royalties, but the first parties received the right to negotiate and do business with other parties without any obligation to pay Lawrence and his estate; Lawrence was to receive no compensation for his services 50% of the royalties paid by the licensee to be produced by him - "said payment is to be made only if, and when received, and not otherwise, by said parties of the first part." It was further agreed that the royalty contract with the licensee should contain suitable provisions with respect to the amount of rate of royalty to be paid, and the time and manner, ascertainment of quantities, the guaranteed minimum, etc., and satisfactory assurances of the financial responsibility of the licensee; also that the agreement should be subject to a demonstration or test under conditions to be set forth in such proposed agreement between the first parties and the licensee. The contract also contained a provision that there was no other or different agreement or understanding between the first parties and the party of the second part than this agreement of August 10th; also that the authority conferred upon Lawrence should not extend beyond September 3, 1915, and that no claim should be made by him against the first parties or any of them for any compensation for his services or efforts unless the same shall have resulted in a final and operative agreement between the parties of the first part and the licensee on or before September 3, 1915, except that in case Lawrence before that time should produce a patent or corporation at any time ready, able and willing to enter into such license agreement upon terms satisfactory to the first parties, and the first parties have not theretofore made any binding contract with other parties for the use of said process, the party of the

second part should be entitled to receive his 20% commission.

The bill asserts that after the execution of this agreement and before September 9th, Lawrence introduced Stokes and Crawford to the Texas Company as a prospective licensee; that its manager stated his company desired to witness a demonstration or test; that the making of this test was delayed from time to time by Sherman on one pretext or another until January, 1916, when Sherman notified Stokes that he was ready to make a demonstration for the Texas Company, and this company sent its representative to witness the same; that at the appointed time Sherman met Stokes and the representative of the Texas Company and informed them that he could not make the test because the defendants William H. Isom and Joseph M. Cudahy, officers of the Cudahy Refining Company, and the Cudahy Refining Company, owned the demonstrating plant in which Sherman had been making his tests and would not permit said tests or demonstrations to be made. It is also asserted by the bill that at the time of the execution of the contract of July 9th Isom, Cudahy and the Cudahy Refining Company had knowledge of the Sherman process and had given property and materials to Sherman that he might perfect it, under an agreement with him that upon its perfection they should have the right to operate a 3,000 barrel plant with said process, by virtue of the provisions of the July 9th contract withholding therefrom the right to operate a 3,000 barrel plant. Subsequently Isom, Cudahy and one Harry F. Sinclair, with other persons, organized the Sinclair Oil and Refining Corporation for the purpose of using the Sherman process, in which they were assisted by Sherman. The bill also asserts that Isom, Cudahy, the Cudahy Refining Company and the

second part should be entitled to receive his 50% commission.

The bill asserts that after the execution of this

agreement and before September 2nd, Lawrence introduced

Stokes and Crawford to the Texas Company as a prospective

licensee; that the manager stated his company desired to

witness a demonstration or test; that the granting of said

test was delayed from time to time by Sherman on the pre-

text of another visit January, 1910, when Sherman notified

Stokes that he was ready to make a demonstration for the

Texas Company, and this company sent its representative to

witness the same; that at the specified time Sherman met

Stokes and the representative of the Texas Company and in-

formed them that he could not make the test because the de-

pendents William A. Isaac and Joseph J. Gurnsey, officers of

the Gurnsey Refining Company, and the Gurnsey Refining Company,

owned the demonstrating plant in which Sherman had been making

his tests and would not permit said tests or demonstrations to

be made. It is also asserted by the bill that at the time of

the execution of the contract of July 21st 1909, Stokes and the

Gurnsey Refining Company had knowledge of the Sherman process

and had given property and materials to Sherman that he might

perfect it, under an agreement with him that upon the per-

fecting they should have the right to operate a 5,000 barrel

plant with said process, by virtue of the provisions of the

July 21st contract stipulating otherwise the right to operate

a 5,000 barrel plant. Subsequently Isaac, Gurnsey and the Harry

P. Sinclair, with other persons, organized the Sinclair Oil and

Refining Corporation for the purpose of taking the Sherman

process, in which they were assisted by Sherman. The bill also

asserts that Isaac, Gurnsey, the Gurnsey Refining Company and the

Sinclair Oil Corporation are all now using the Sherman process, and that they are negotiating with the Texas Company to license it to use the process.

The prayer of the bill is that Sherman, Isom, Cudahy, the Cudahy Refining Company and the Sinclair Oil Corporation be enjoined from manufacturing or employing the Sherman process; that an accounting be taken of all dealings between Sherman and these last named parties and that they be required to account for any illegal or unauthorized use of the process; that Sherman be enjoined from making any contract or agreement of any nature to convey the right to use said process, and that the defendants be enjoined from using the process under any contract executed prior to the date of filing of the bill of complaint, unless such contract were executed under the agreement of July 9, 1915.

We are of the opinion that the demurrer was rightly sustained and the bill dismissed, for the reason that complainant is not shown to have had any interest in the Sherman process which would entitle him to the relief he seeks. His rights arise solely out of the contract of August 10th. In unambiguous terms this is simply a broker's contract. He agrees to introduce the parties owning the Sherman process to a responsible party who may enter into negotiations looking to a licensee's contract on a royalty basis, upon such terms as the owners and the prospective licensee may be able to agree upon. The rights of the owners to negotiate with other parties in the meantime is definitely reserved, and Lawrence's compensation is conditioned solely upon the owners and his client concluding their negotiations by a final and operative agreement and the receipt by the owners of payment of the royalties under such contract. It appears from the bill that the owners, as

incidental to the operation are all now being the American process, and that they are negotiating with the Texas Company to license it to use the process.

The prayer of the bill is that Sherman, Lamm,

Cudahy, the Cudahy Refining Company and the Sinclair Oil Corporation be enjoined from manufacturing or employing the Sherman process; that an accounting be taken of all dealings between Sherman and these last named parties and that they be required to account for any illegal or unauthorized use of the process; that Sherman be enjoined from making any contract or agreement of any nature to convey the right to use said process, and that the defendants be enjoined from using the process under any contract executed prior to the date of filing of the bill of complaint, unless such contract were executed under the agreement of July 9, 1913.

We are of the opinion that the defendant was rightly sustained and the bill dismissed, for the reason that complaint is not shown to have had any interest in the Sherman process which would entitle him to the relief he seeks. His rights arise solely out of the contract of August 10th. In undisputed terms that is simply a buyer's contract. He agrees to introduce the parties owning the Sherman process to a responsible party who may enter into negotiations looking to a licensee's contract on a royalty basis, upon such terms as the owners and the prospective licensee may be able to agree upon. The right of the owners to negotiate with other parties in the meantime is definitely reserved, and defendant's contention is conditional solely upon the owners and his client concluding their negotiations by a final and operative agreement and the receipt by the owners of payment of the royalties under such contract. It appears from the bill that the owners, as

they had a right to do, entered into contractual relations with other parties than the party produced by Lawrence. Upon the happening of such an event Lawrence had agreed that he should receive no compensation.

No reasonable theory is suggested upon which Lawrence can base his claim that by the transactions above stated he acquired an interest in the Sherman process. No argument predicated upon the assertion that the process was a secret one known to Sherman alone, can avail. The cases cited by counsel for complainant hold that one who through fiduciary relations acquires from another a trade secret, cannot be permitted to use this information to the harm of that one. They do not apply to this case, for two reasons: (1) Complainant has acquired no trade secret from Sherman or anyone else; neither has Sherman, who invented the process. (2) It is not claimed that knowledge of the so-called "secret" of the process has been gained through abuse of confidence or used improperly.

Reduced to its simplest terms, the claim of plaintiff is that because he had knowledge of the existence of a secret process for refining oil, and undertook as a broker to bring the owner and a prospective licensee together, he became a part owner in the process itself. This claim has no greater merit than would the claim of a real estate broker to an interest in the real estate towards the sale of which he had rendered service.

We cannot assent to the contention that because in the contract with complainant dated August 10, 1915, reference is made to the contract of July 9th, to which complainant was not a party, he thereby became a party thereto. The reference is simply to identify the subject-matter of the August 10th contract

they had a right to be, entered into contractual relations with other parties than the party mentioned by law. Upon the happening of such an event Lawrence had agreed that he should receive no compensation.

No reasonable theory is suggested upon which Lawrence can base his claim on the transactions above stated. He recognized an interest in the oilman process, no statement predicated upon the assertion that the process was a secret one known to others alone, can avail. The cases cited by counsel for complainant hold that one who through fiduciary relations acquires from another a trade secret, cannot be permitted to use this information to the harm of that one. They do not apply to this case, for two reasons: (1) Complainant has acquired no trade secret from Lawrence or anyone else; neither has he, and invented the process. (2) It is not claimed that knowledge of the so-called "secret" of the process has been gained through a course of confidence or used improperly.

Reduced to its simplest terms, the claim of complainant is that because he had knowledge of the existence of a secret process for refining oil, and undertook as a broker to bring the owner and a prospective licensee together, he became a part owner in the process itself. This claim has no greater merit than would the claim of a real estate broker to an interest in the real estate towards the sale of which he had rendered service.

We cannot assent to the contention that because in the contract with complainant dated August 10, 1915, reference is made to the contract of July 29th, to which complainant was not a party, he thereby became a party thereto. The reference is simply to identify the subject-matter of the August 10th contract

and to recognize the authority of Stokes and Crawford to contract on behalf of themselves and Sherman and Norris.

For the reasons above indicated we hold that the order of the chancellor dismissing the bill was right and it is affirmed.

AFFIRMED.

is allowed.

order of the Chancellor dismissing the bill was right and it

for the reasons above indicated we held that the

trust on behalf of themselves and, whether and Justice.

and to recognize the authority of States and Courts to con-

RALPH NEUFELD,
(Complainant)

Appellee,

vs.

MATILDA S. GUDICHSEN et al.,
(Defendants).

APPEAL FROM

NILSON BROTHERS, a corp.,
(Cross-Complainant)

Appellee,

CIRCUIT COURT,

vs.

MATILDA S. GUDICHSEN et al.,
(Cross-Defendants).

COOK COUNTY.

On Appeal of
MATILDA S. GUDICHSEN.

211 I.A. 238

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Complainant, Ralph Neufeld, filed a bill to foreclose a second mortgage trust deed made by the defendant Matilda S. Gudichsen, covering a flat building owned by her. Nilson Brothers filed an intervening petition and cross-bill seeking to establish a mechanic's lien. There was also another lien claimant, about which there seems to be no controversy. The cause was referred to a master in chancery, who took evidence and reported recommending a decree in favor of the complainant, Neufeld, and finding that Nilson Brothers was entitled to its lien. Exceptions were filed and overruled by the chancellor, who entered a decree in accordance with the recommendations of the master.

Defendant asserts two defenses: (1) Neufeld, claiming to be the legal holder of the notes secured by the trust deed, exercised the option therein expressed to declare the whole of the indebtedness immediately due and payable because of a breach of the covenants and agreements

and Justice recently delivered the opinion of the court.
 Complaint, Ralph Newfeld, filed a bill to
 foreclose a second mortgage trust deed made by the defendant
 Matilda S. Gudichsen, covering a flat building owned by
 her. Wilson Brothers filed an intervening petition and
 cross-bill seeking to establish a mechanic's lien. There
 was also another lien claimant, about which there seems
 to be no controversy. The cause was referred to a master
 in chancery, who took evidence and reported recommending
 a decree in favor of the complainant, Newfeld, and finding
 that Wilson Brothers was entitled to its lien. Exceptions
 were filed and overruled by the chancellor, who entered a
 decree in accordance with the recommendations of the master.
 Defendant asserts two defenses: (1) Newfeld,
 claiming to be the legal holder of the notes secured by the
 trust deed, exercised the option therein expressed to de-
 clare the whole of the indebtedness immediately due and pay-
 able because of a breach of the covenants and agreements

211 L.A. 238

COOK COUNTY.

CIRCUIT COURT.

APPEAL FROM

On appeal of
 MATILDA S. GUDICHSEN.
 (Cross-defendant).
 vs.
 WILSON BROTHERS, a corp.,
 (Cross-complainant).
 Appellee.
 vs.
 MATILDA S. GUDICHSEN et al.,
 (Defendants).
 Appellant.
 RALPH NEWFELD,
 (Complainant).
 Appellee.

therein contained, and defendant asserts that Neufeld was not the legal holder of the notes. (2) Because of usury the defendant should not be charged with interest. The facts which appear show that neither of these defenses has merit.

The notes, executed by the defendant Matilda S. Gudichsen and her husband, were given to secure the payment of twenty notes for \$200 each and one note for \$1,000. The notes and trust deed were delivered to one Charles Chapman as part payment on his contract with the Gudichsens for the masonry work on the building conveyed by the trust deed. This contract provided for the payment of \$10,230 in cash; in addition Chapman was to receive other money for extra work. The trust deed and notes were given to Chapman before any other payment was made to him. Chapman sold the notes and trust deed to the complainant, Neufeld. The evidence shows that the Gudichsens made payments to Chapman on account of his contract, but when this was finally closed it was shown that Chapman had been overpaid to the extent of \$1,000. The master therefore recommended that the \$1,000 note secured by the trust deed should be canceled, leaving the amount of notes under the trust deed at \$4,000. The decree so provides, and the amount found due thereby, both principal and interest, is upon the basis of a \$4,000 indebtedness, and the defendant admits this amount of indebtedness.

It is not important that Neufeld gave possession of the \$1,000 note to Chapman as security in connection with other matters; Neufeld was still its owner. But even if this were not true, the decree declares it a nullity and of no effect. It is not contended that Neufeld was not in every

therein contained, and defendant asserts that Newfield was not the legal holder of the notes. (2) Because it is the defendant's duty to be charged with interest, the facts which appear show that neither of these defenses has merit.

The notes, executed by the defendant William A. Newfield, and her husband, were given to secure the payment of twenty notes for \$200 each and one note for \$1,000. The notes and trust deed were delivered to the Gratiot County on part payment on his contract with the Gratiot County for the masonry work on the building conveyed by the trust deed. This contract provided for the payment of \$10,250 in cash; in addition Chapman was to receive other money for extra work. The trust deed and notes were given to Chapman before any other payment was made to him. Chapman sold the notes and trust deed to the complainant, Newfield. The evidence also shows that the Gratiot County made payments to Chapman on account of his contract, but when this was finally closed it was shown that Chapman had been overpaid to the extent of \$1,000. The master therefore recommended that the \$1,000 note secured by the trust deed should be canceled, leaving the amount of notes under the trust deed at \$4,000. The decree so provided, and the amount found due thereby, both principal and interest, is upon the basis of a \$4,000 indebtedness, and the defendant admits this amount of indebtedness. It is not important that Newfield have possession of the \$1,000 note to Chapman as security in connection with other matters; Newfield was still its owner. But even if this were not true, the decree declares it a nullity and of no effect. It is not contended that Newfield was not in every

sense the legal holder of the other notes secured by the trust deed.

A further consideration is that at the time of the decree all the notes had matured. Amounts which become due pending a hearing on foreclosure may properly be included in the decree. Wolcott v. Lake View B. & L. Ass'n. 59 Ill. App. 415, and cases there cited; also Brown v. Miner. 128 Ill. 148.

These facts also dispose of the question of usury, which is defined to be an illegal profit required and received by a lender of a sum of money from the borrower. Bouvier's Law Dict. There is here merely the fact of overpayment to Chapman, occurring after the sale of the notes and trust deed to Neufeld. This mistake was corrected by canceling the \$1,000 note. The claim of usury has no substantial basis.

It is said that Nilson Brothers is not entitled to a lien for the reason that it installed other plumbing fixtures than those it had contracted to install. The evidence does not support this. The contract does not call for fixtures made by any particular manufacturer, and the testimony of Herman Gudichsen, the husband, that August Nilson orally agreed to put in "Federal-Huber" fixtures is contradicted by Nilson. Both the Gudichsens frequently observed the installation of the plumbing, and made no objection to the character of the equipment. Furthermore, a final certificate was issued showing the amount due, and the Gudichsens told Nilson Brothers that the money called for by the certificate was with the people making the loan, and that Nilson Brothers should have it. August Nilson testified that the

seems the legal holder of the other notes secured by the

trust deed.

A further consideration is that at the time of

the decree all the notes had matured. Amounts which become

due pending a hearing on foreclosure may properly be in-

cluded in the decree. Wolcott v. Linn, 111 Minn. 148.

59 Ill. App. 415, and cases there cited; also Brown v. Miner.

125 Ill. 148.

These facts also dispose of the question of usury.

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ceived by a lender of a sum of money from the borrower.

Convict's law book. There is here merely the fact of over-

payment to Canyon, occurring after the sale of the notes and

trust deed to Hensley. This mistake was corrected by can-

celing the \$1.00 note. The claim of usury has no substantial

basis.

It is said that Nelson Brothers is not entitled

to a lien for the reason that it installed other plumbing

fixtures than those it had contracted to install. The evi-

dence does not support this. The contract does not call for

fixtures made by any particular manufacturer, and the testi-

mony of Herman Gundlachsen, the husband, that August Nelson

orally agreed to put in "Federal-Rubber" fixtures is contra-

dicted by Nelson. Both the Gundlachsen's frequently observed

the installation of the plumbing, and made no objection to

the character of the equipment. Furthermore, a final cer-

tificate was issued showing the amount due, and the Gundlachsen's

told Nelson Brothers that the money called for by the certifi-

cate was with the people making the loan, and that Nelson

Brothers should have it. August Nelson testified that the

Federal-Huber and Wolff goods were about the same grade and that one was about the same price as the other, varying sometimes with different jobs, and that it made no particular difference to Nilson Brothers which it installed, as one was as good as the other. We are of the opinion that the master found the proper amount due Nilson Brothers and that the decree in this respect is correct.

There was no error in charging the defendant with the amount of solicitor's fees charged, or with the costs before the master. The evidence shows that the fees were reasonable and customary, and the payment of such fees was provided for by the trust deed. As to the expenses of the litigation, it is the general rule that the loser pays, and we see no abuse of discretion on the part of the chancellor in following the general rule. >

We are of the opinion that the decree entered was a proper one, and it is affirmed.

AFFIRMED.

Federal-land and wolf goods were about the same price and that one was about the same price as the other, varying sometimes with different jobs, and that it made no particular difference to Wilson Brothers when it increased, as one was as good as the other. We are of the opinion that the master found the proper amount due Wilson Brothers and that the decree in this respect is correct.

There was no error in charging the defendant with the amount of solicitor's fees charged, or with the debts before the master. The evidence shows that the fees were reasonable and necessary, and the payment of such fees was provided for by the trust deed. As to the expenses of the litigation, it is the general rule that the loser pays, and we see no abuse of discretion in the part of the chancellor in following the general rule.

We are of the opinion that the decree entered was a proper one, and it is affirmed.

ATTEST.

HOWARD S. GEMMILL, Admr. of
the estate of Anton Czerner,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

211 I.A. 246

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in a personal injury suit in which appellant was charged with negligence whereby appellee's intestate, a minor 12 or 13 years old, lost his life. Several cogent reasons are presented for reversal, including the claim that the negligence charged was not the proximate cause of the injury, and that there was a fatal variance, and that the statute of limitations had run. But none of these points need be considered in view of our conclusion that the minor's contributory negligence defeated the right to recover.

The facts as to how the accident happened are not disputed. The boy went with other boys upon the right of way and tracks used by appellant to pick up coal. While there they saw an approaching freight train and as it passed, moving about 6 miles per hour, he attempted to get on one of the cars that contained coal. One of the boys with him, testifying for plaintiff, described the accident as follows: "We seen the train and then we got between the first and second track and stood there, about 3 feet from the engine as it went by. We continued to stand there while the train was passing. The

HOWARD E. GREENWILL, Admin. of
the estate of Anton Greiner,
Appellee,

vs.

GRAND TRUNK RAILWAY
COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

3111 A. 216

MR. PRESIDING JUSTICE SAYS:
BEHAVIOR AND THE CRIMINAL OF THE COURT.

This appeal is from a judgment in a personal injury suit in which appellant was charged with negligence. Appellee's intestate, a minor 12 or 13 years old, lost his life. Several relevant reasons are presented for reversal, including the claim that the negligence charged was not the proximate cause of the injury, and that there was a fatal variance, and that the estate of limitations had run. But none of these points need be considered in view of our conclusion that the minor's contributory negligence defeated the right to recover.

The facts as to how the accident happened are not disputed. The boy went with other boys upon the right of way and tracks used by appellant to pick up coal. While there they saw an approaching freight train and as it passed, moving about 6 miles per hour, he attempted to get on one of the cars that contained coal. One of the boys with him, testifying for plaintiff, described the accident as follows: "We were the train and then we got between the first and second track and stood there, about 5 feet from the engine as it went by. We continued to stand there while the train was passing. The

train came by and Tony, the boy that was killed, got on the train first. He had one foot on the train and one hand on, just about to get on with his other foot, when he tripped over a tie and then he went under. That is all that I seen." He also testified that Tony had been with the boys upon the tracks at other times. There was no evidence that Tony did not possess the average intelligence of one of his age. It cannot reasonably be claimed that one of his age having such experience and ordinary intelligence would not be aware of the danger of attempting to climb on a car moving at such speed. In the light of these facts, which cannot be lightly disregarded, showing unmistakable negligence on his part, we think the court should have given an instructed verdict for defendant company regardless of any other question in the case. It is enough merely to refer to other similar cases where the courts have reached the same conclusion. (LeBeau v. P. C. C. & St. L. Ry. Co., 69 Ill. App. 557; Fitzgerald v. C. B. & Q. R. R., 114 id. 118; Rothschild v. Levy, 118 id. 78; Hanna v. I. C. Ry. Co., 129 id. 134; Rayfield v. Sans Souci Park, 147 id. 493; Kochler v. Chicago Ry. Co., 166 id. 574.)

In the Fitzgerald case, citing the LeBeau case, the court said that a boy 12 years of age, of ordinary intelligence, knows that it is dangerous to attempt to get on a moving freight train. In the Hanna case a boy 12 years of age was presumed to have the capacity to comprehend and avoid a danger he was in a place to incur several times before. As was said in the Rayfield case reasonable minds can reach only one conclusion from the evidence, namely, that the boy "did not exercise ordinary care, but, on the contrary, was guilty of negligence which caused the accident."

train came by and Tony, the boy that was killed, got on the train first. He had one foot on the train and one hand on, just about to get on with his other foot, when he tripped over a tie and then he went under. That is all that I mean. He also testified that Tony had been with the boys upon the tracks at other times. There was no evidence that Tony did not possess the average intelligence of one of his age. It cannot reasonably be claimed that one of his age having such experience and ordinary intelligence would not be aware of the danger of attempting to climb on a car moving at such speed. In the light of these facts, which cannot be lightly disregarded, showing Tom's negligence on his part, we think the court should have given an instruction verdict for defendant company regardless of any other question in the case. It is enough merely to refer to other similar cases where the courts have reached the same conclusion. (Hall v. F. O. C. & N. Y. Co., 63 Ill. App. 527; Pittsford v. F. O. C. & N. Y. Co., 118 Ill. 124; Bohnsch v. Levy, 118 Ill. 125; James v. I. O. O. F., 120 Ill. 124; Hayfield v. Shaw Grant Park, 147 Ill. 483; Koehler v. Chicago Ry. Co., 166 Ill. 574.)

In the Pittsford case, citing the James case, the court said that a boy 12 years of age, of ordinary intelligence, knows that it is dangerous to attempt to get on a moving freight train. In the James case a boy 12 years of age was presumed to have the capacity to comprehend and avoid a danger he was in a place to incur several times before. He was said in the Hayfield case reasonably to be expected only one explanation from the evidence, namely, that the boy did not exercise ordinary care, but, on the

341 - 23307

FINDING OF FACT.

We find that the deceased, Anthony Czerner, came to his death through contributory negligence on his part while attempting to climb upon a moving car on appellant's tracks.

241 - 25307

VINDIC OF FACT.

We find that the deceased, Anthony Garney, came to his death through contributory negligence on his part while attempting to climb upon a moving car on defendant's tracks.

MARY ELIZABETH TRUMBULL,
Defendant in Error,

vs.

WILLIAM H. BRYANT,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 247

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

At the close of evidence in this case the court denied defendant's and allowed plaintiff's motion for an instructed verdict.

The suit was for rent claimed to have accrued under a lease for certain months after a time when defendant claimed that there was a surrender of the premises. His was the only evidence on that subject, and undisputed. It left no question of facts at issue and presented circumstances which we think in fact and law constituted a surrender of the premises with plaintiff's acquiescence.

His testimony was in substance that he had vacated the premises some months before he gave up the keys thereof to plaintiff, that he had paid rent up to that time, that the keys were given up at plaintiff's request, defendant stating at the time of surrendering them that in so doing he was to be released from further obligations, and that plaintiff took and retained the keys without dissenting from that proposition and without demanding any further rent until about nine months later when this suit was brought. Under such undisputed testimony and circumstances we think the evidence showed that plaintiff took the keys upon the understanding that by so doing she was accepting defendant's proposition to

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

RAY KILPATRICK TRUENITZ,
Defendant in Error,

vs.

WILLIAM M. BRYANT,
Plaintiff in Error.

2111 A. 247

MR. FRANKLIN J. TICE BARRIS
DELIVERED THE OPINION OF THE COURT.

At the close of evidence in this case the court
denied defendant's and allowed plaintiff's motion for an
instructed verdict.

The suit was for rent claimed to have accrued
under a lease for certain months after a time when defendant
claimed that there was a surrender of the premises. His
was the only evidence on that subject, and undisputed. It
left no question of facts at issue and presented circum-
stances which we think in fact and law constituted a surrender
of the premises with plaintiff's acquiescence.

His testimony was in substance that he had
vacated the premises some months before he gave up the keys
thereof to plaintiff, that he had paid rent up to that time,
that the keys were given up at plaintiff's request, defendant
stating at the time of surrendering them that in so doing he
was to be released from further obligations, and that plain-
tiff took and retained the keys without dissenting from that
proposition and without demanding any further rent until about
nine months later when this suit was brought. Under such
undisputed testimony and circumstances we think the evidence
showed that plaintiff took the keys upon the understanding
that by so doing he was accepting defendant's proposition to

surrender the premises and terminate the lease. The judgment will be reversed.

REVERSED WITH FINDING OF FACT.

under the present and terminate the lease. The

judgment will be reversed.

REVEREND FIVE THINGS OF YESTER.

FINDING OF FACT.

We find that no rent was due under the lease in question but that said lease was terminated, and that appellee, Mary E. Trumbull, accepted the surrender of the premises so leased from appellant, Wm. H. Bryant, the lessee, before the period for which such rent was claimed.

FINDING OF FACT.

We find that no rent was due under the lease in question but that said lease was terminated, and that appellee, Mary A. Trumbull, accepted the surrender of the premises so leased from appellant, W. E. Bryant, the lessee, before the period for which such rent was claimed.

211 I.A. 248

MARY LAWSON,
Defendant in Error,

vs.

DR. A. WILBERFORCE WILLIAMS,
sued as A. Wilerfore Williams,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The striking of the bill of exceptions from the files leaves before us the question whether the judgment can stand on the common law or clerk's record. The verdict was for a tortious conversion of plaintiff's property and the judgment was entered thereon. There are no averments in the statement of claim to which such a verdict is responsive. In fact it is impossible to determine from the plaintiff's statement of claim the pleader's theory of the cause of action. / Said statement begins by saying that plaintiff's claim is "for money due and received by defendant from moneys withdrawn from the Illinois Trust & Savings Bank from October 15, 1897 to August 11, 1903." Then follows averments that in each year from 1903 to 1915, inclusive, defendant promised to pay plaintiff "the moneys so due her from withdrawals made by him from said bank." Thus far the averments suggest the theory of assumpsit. But the pleader then concludes with the averment "yet though often requested defendant has not paid plaintiff said money * * * but has fraudulently and feloniously withdrawn said moneys from said bank and converted same to his own use." While the statement of claim contains no averments of fact to support a

2111.A.248

MARY LAWRENCE,
Defendant in Error,

vs.

ORDER TO
MUNICIPAL COURT

OF CHICAGO.

DR. A. WILLIAM GEORGE WILLIAMS,
as and as A. Williams Williams,
Plaintiff in Error.

MR. PRESIDING JUSTICE BATES
WILLIAM THE COURT OF THE COURT.

The striking of the bill of exceptions from the
files leaves before us the question whether the judgment
can stand on the common law or equity record. The verdict
was for a tortious conversion of plaintiff's property and
the judgment was entered thereon. There are no averments
in the statement of claim to which such a verdict is
responsive. In fact it is impossible to determine from
the plaintiff's statement of claim the plaintiff's theory of
the cause of action. Said statement begins by saying that
plaintiff's claim is "for money due and received by defendant
from moneys withdrawn from the Illinois Trust & Savings Bank
from October 15, 1897 to August 11, 1902." Then follows
averments that in each year from 1900 to 1915, inclusive,
defendant promised to pay plaintiff "the moneys so due her
from withdrawals made by him from said bank." Then far the
averments suggest the theory of assumpsit. But the plaintiff
then concludes with the averment "yet though often requested
defendant has not paid plaintiff said money * * * but has
fraudulently and feloniously withdrawn said moneys from said
bank and converted same to his own use." While the state-
ment of claim contains no averments of fact to support a

felonious withdrawal of the money, yet such conclusion implies a withdrawal without plaintiff's authority or consent, and so a withdrawal of the bank's money and not hers. The verdict, therefore, is not responsive to the statement of claim, which neither avers nor states facts to show that her money was converted to defendant's own use, and concludes with a statement inconsistent with such a theory.

Had the verdict been responsive to the averments in assumpsit we might disregard the other averments. But inasmuch as the statement of claim does not state the elements of a tort, and the verdict finds defendant guilty of one, the judgment cannot stand and must be reversed and the cause will be remanded.

REVERSED AND REMANDED.

felonious withdrawal of the money, yet such conclusion implies a withdrawal without plaintiff's authority or consent, and so a withdrawal of the bank's money and not hers. The verdict, therefore, is not responsive to the statement of claim, which neither avers nor states facts to show that her money was converted to defendant's own use, and concludes with a statement inconsistent with such a theory.

Had the verdict been responsive to the averments in assumption we might disregard the other averments. But inasmuch as the statement of claim does not state the elements of a tort, and the verdict finds defendant guilty of one, the judgment cannot stand and must be reversed and the cause will be remanded.

REVERSED AND REMANDED.

OLIVE M. NELSON,
Appellant,

vs.

SOCIETY NORDSTJERN,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff as nearest relative of her deceased husband who was a member of the defendant society, sued for the death benefits that accrue from the society on the death of a member in good standing. Under its rules and by-laws assessments were levied on each member for death benefits to relatives of deceased members. A notice of an assessment levied for such benefits was duly mailed to plaintiff's husband on March 7, 1916, to his last known address, given as "4925 State Street", presumably meaning Chicago, where the society and its members met. The by-laws were in the Swedish language, and there was some conflict over what was the correct translation into English. The preponderance of evidence, however, was that they provided for an automatic suspension of any member who failed to pay a death benefit assessment within the prescribed time for payment, which was before the third regular meeting after the society received official notice of such death. The third regular meeting after receiving such official notice and after transmitting same to plaintiff's husband as aforesaid, was held May 5th. On May 8th, plaintiff's husband died and had not paid such assessment. By virtue of the rules, therefore, the right to death benefits from his membership was forfeited, if notice of the assessment

111-111-350

102 - 23425

OLIVE M. WOOD, Defendant,
vs.
SOCIETY OF SWEDISH AMERICANS, Plaintiff.

OFFICE OF THE
CLERK OF THE COURT,
OF CHICAGO.

IN REPLYING TO THE ORDER
DULY MADE BY THE COURT.

Plaintiff as heretofore testified at her deceased husband
who was a member of the defendant society, and for the death
benefits that accrued from the society on the death of a member
in good standing. Under the rules and by-laws of the society
were levied on each member for death benefits to relatives
of deceased members. A notice of an assessment levied for
such benefits was duly mailed to Plaintiff's husband on March
7, 1916, to his last known address, given as "1415 State
Street", presumably meaning Chicago, where the society and
its members met. The by-laws were in the Swedish language,
and there was some conflict over what was the correct
translation into English. The preponderance of evidence,
however, was that they provided for an automatic suspension
of any member who failed to pay a death benefit assessment
within the prescribed time for payment, which was before the
third regular meeting after the society received official
notice of such death. The said regular meeting after re-
ceiving such official notice and after transmitting same to
Plaintiff's husband as aforesaid, was held May 25th. On May
25th, Plaintiff's husband died and had not paid such assessment.
By virtue of the rules, therefore, the right to death benefits

aforesaid was duly given and received. We think there was prima facie proof of due mailing and of the receiving of such notice through the mail. There was also proof of the fact that before May 5th, the deceased actually knew of such assessment and that his rights as a member would then be forfeited unless the assessment was paid and that he did not intend to pay it. This tended to corroborate his receipt of notice mailed to him. We think, therefore, that the court before whom the case was tried without a jury, was justified in finding a verdict for defendant.

AFFIRMED.

before it was given and received. As there were
being false proof of the making out of the receiving of such
 notice through the mail. There was also proof of the fact
 that before the day, the deceased actually knew of each
 assessment and that he was as a matter of fact then he
 forfeited unless the assessment was paid and that he did not
 intend to pay it. This seemed to corroborate his receipt
 of notice mailed to him. He thinks, therefore, that the
 court before him the case was tried without a jury, was
 justified in finding a verdict for defendant.

ATTORNEY.

G. W. FARRAND, Appellant,

vs.

CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY, a corp.,
Appellee.

211 I.A. 251

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee for damages for alleged breach of contract to carry safely and without negligence a shipment of hogs from Fulkana, S. D., to the stock yards in Sioux City, Iowa. The court's findings were for appellee and we cannot say that the evidence did not warrant the court's conclusions.

We find nothing in the record to show negligence by appellee. Some of the hogs when delivered were frozen. This was accounted for by the extreme low temperature at the time of their transportation, and delays ensuing from severe weather conditions.

The transportation was in January, 1916. Appellant had on the morning before loading the hogs brought them by wagon a distance of 23 miles to the point of shipment. It was very cold at the time and getting colder. Falling snow and temperature and increased velocity of the wind interfered with operation of trains. The one in question was for a time stalled in a snow bank, and in addition to delay from necessary slower locomotion, to expedite which the tonnage was reduced so that perishable freight only was forwarded after the train was stalled, there was seemingly unavoidable

122 .A.1115

APR 21 1964
MUNICIPAL COURT
OF CHICAGO

1915

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CHICAGO, ILLINOIS
JANUARY 1941
Apples

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U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

and we cannot say that the evidence did not warrant the court's conclusions.

severe weather conditions. This was accounted for by the extreme low temperature at the time of their transportation, and delays enroute from by apoplexy. Some of the dogs when delivered were frozen. We find nothing in the record to show negligence.

after the train was stalled, there was seemingly unavoidable
was reduced so that perishable freight only was forwarded
necessarily slower locomotion, to expedite which the train
stalled in a snow bank, and in addition to delay from
with operation of trains. The one in question was for a time
and temperature and increased velocity of the wind interfered
was very cold at the time and getting colder. Falling snow
upon a distance of 25 miles to the point of shipment. It
had on the morning before leaving, the night previous then by
The transportation was in January, 1916. Appelman

delay at two points of transfer, at the first by waiting for the first regular train, and at the second by reason of frozen switches and frozen ash pans on the engines. The temperature had fallen to 18 degrees below zero, the wind had reached a velocity of 37 miles per hour, and nearly 6 inches of snow had fallen. The delays and loss seemed attributable to conditions over which appellee had no control, and appellee seems to have done all that was practicable to prevent delay or disaster from them. It does not appear that there was any neglect by way of unnecessary exposure of the stock by the company, but in contrast, it appears that had plaintiff, who accompanied his stock, exercised the same precaution as another shipper of hogs who transported some by the same train without loss, and furnished more straw and corn for his stock, he too would have met with no loss. We see no good grounds for disturbing the court's conclusions.

AFFIRMED.

only at two points of transfer, at the time by waiting for the first regular train, and at the second by reason of frozen switches and frozen cash pans on the engines. The temperature had fallen to 16 degrees below zero, the wind had reached a velocity of 37 miles per hour, and nearly 6 inches of snow had fallen. The delays and loss seemed attributable to conditions over which appellees had no control, and appellees seem to have done all that was practicable to prevent delay or disaster from them. It does not appear that there was any neglect by way of unnecessary exposure of the stock by the company, but in contrast, it appears that had plaintiff, who accompanied his stock, exercised the same precaution as another shipper of dogs who transported some by the same train without loss, and furnished some straw and corn for his stock, he too would have met with no loss. We see no good grounds for regarding the court's conclusions.

APPEAL.

The first question is whether the court's conclusions are supported by the evidence. The evidence shows that the appellees took all reasonable precautions to protect their stock from the weather. They provided straw and corn for the stock, and the stock was not exposed to the weather for any unreasonable length of time. The court's conclusion that the appellees were negligent is not supported by the evidence. The second question is whether the court's conclusion that the appellees were not negligent is supported by the evidence. The evidence shows that the appellees took all reasonable precautions to protect their stock from the weather. They provided straw and corn for the stock, and the stock was not exposed to the weather for any unreasonable length of time. The court's conclusion that the appellees were negligent is not supported by the evidence.

193 - 23536

ELI L. NISSLY et al.,
Appellants,

vs.

M. WAINER,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 254

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee was sued for a balance of account for \$36, and pleaded by way of set off, a breach of contract by appellant for failure to deliver as per agreement 1500 lbs. of tobacco leaf at 12¢ per lb., which, at the time of failure to deliver, was worth 22¢ per lb., whereby appellee lost \$150. The parties filed a stipulation as to the facts, which admitted the claims of the respective parties, as pleaded, and that plaintiff was a nonresident of this state, but reserved as the only question for this court the propriety of appellee's set off. Appellant claimed it is for unliquidated damages and that they cannot be set off against a nonresident plaintiff. This court has decided to the contrary in another case and we adhere to the views there expressed. (Ideal Coated Paper Co. v. Samuel Cupples Envelope Co., 169 Ill. App. 484.) While we think the set off thus stated and agreed upon may be regarded as in the nature of liquidated damages, yet if unliquidated they were properly allowed under the decision cited.

In view of the fact that the court deducted plaintiff's undisputed claim from the unquestioned amount of appellee's set off, leaving no question except the authority

LI B. NICHOLSON & CO.,
Appellants,
vs.
M. WALTON,
Appellee.

APPEAL FROM
JUDICIAL ORDER
OF CIRCUIT COURT
OF CHICAGO.

211 A. 234

RECEIVED THE OFFICE OF THE CLERK
OF THE CIRCUIT COURT OF CHICAGO

Appellee was sued for a balance of account for \$50, and plaintiff by way of set-off, a balance of account for \$50. Plaintiff's failure to deliver in her agreement 1900 lbs. of tobacco leaf at 12¢ per lb., which, at the time of failure to deliver, was worth 32¢ per lb., whereby appellee lost \$150. The parties filed a stipulation as to the facts, which admitted the claims of the respective parties, as pleaded, and that plaintiff was a non-resident of this State, but reserved as the only question for this court the propriety of appellee's set-off. Appellant claimed it is for undistributed damages and that they cannot be set off against a non-resident plaintiff. This court has decided to the contrary in another case and we adhere to the views there expressed. (Local Costed Paper Co. v. General Cigarette Envelope Co., 103 Ill. App. 244.) While we think the set-off was stated and agreed upon by the parties as in the nature of liquidated damages, yet if undistributed they were properly allowed under the decision cited.

In view of the fact that the court deduced plaintiff's undistributed claim from the unstated amount of appellee's set-off, leaving no question except the authority

of the court to entertain the set off we shall disallow appellee's motion to strike the stipulation from the record for alleged irregularity in certification.

AFFIRMED.

211 - 23555

M. BLICKSTEIN,
Appellee,

vs.

THE CHICAGO & ALTON
RAILROAD COMPANY, a
corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 255

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question involved on this appeal is whether or not the verdict and judgment were warranted by the evidence. Plaintiff shipped by the defendant carrier from Dwight to Chicago 19 horses, one of which was dead when the train arrived, the only fact on which plaintiff relied for recovery. It was shown by defendant's witnesses not only that the train was not roughly handled in any way but that the company furnished suitable means of transportation and exercised that degree of care which the nature of the property required. There was a decided preponderance of evidence that the horse in question came to its death either from the viciousness of the other horses in the car or its lack of vitality, for neither of which, in the absence of negligence on its part, is the carrier, under the law, responsible. (I. & St. L. Ry. Co. v. Jurex, 8 Ill. App. 160; Burke v. U. S. Exp. Co., 37 id. 505; C. R. I. & P. R. Co. v. Harmon, 12 id. 54; I. C. R. R. Co. v. Erelsford, 13 id. 251; Libro v. C. E. C. & St. L. R. Co., 202 id. 418; Colsch v. C. M. & St. P. R. Co., 153 N. W. 327.)

The shipper loaded his horses without tying them, and they were kicking and biting one another from the time they were loaded. Defendant's employes saw the horse down at different places en route and endeavored to get him up,

without success, doing seemingly all that was practicable to that end. Under the circumstances the company could not have been required to unload the horses and thus delay and interfere with transporting the freight in the other 30 cars in the train. It also appears that the horse in question was much smaller and in a much poorer condition than the rest of the horses, and though standing when the train started, was unable from its size and physical condition to withstand the viciousness of the other horses. Of this the shipper took the risk. We find no evidence whatever of neglect by the carrier.

REVERSED WITH FINDING OF FACT.

the fact that no evidence whatever of neglect by the
violation of the other horses. Of this the higher rank
unlike from its size and physical condition to withstand the
the horses, and though standing when the train started, was
much smaller and in a much poorer condition than the rest of
the train. It also appears that the horse in question was
tied with transporting the freight in the other 20 cars in
been required to unload the horses and thus delay and inter-
that end. Under the circumstances the company could not have
without excuse, being seemingly all that was practicable to

211 - 23555

FINDING OF FACT.

We find that appellant, the Chicago & Alton Railroad Company, a corporation, was not guilty of the negligence charged in the statement of claim, and that the horse in question came to his death by means of its physical weakness and violence suffered from other horses with which it was shipped.

WITNESSES OF FACT.

We find that appellant, the Chicago & Alton Railroad Company, a corporation, was not guilty of the negligence charged in the statement of claim, and that the injury in question came to his death by means of its physical weakness and violence only, and from other causes with which it was not charged.

252 - 23597

KATE M. WEST,
Appellee,

vs.

J. A. McNAUGHTON,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 261

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

On June 21st, 1917, a judgment by confession was entered herein for rent and attorney's fees. Shortly after the entry of judgment a motion was presented to have the same vacated, supported by affidavits setting up facts purporting to show a meritorious defense. A counter affidavit was filed, claiming that the right to rent under the lease had been adjudicated in a previous judgment for rent due for two previous months under the lease. The trial judge consulted the files and the record in the other case, and denied the motion, holding that the matter had been adjudicated. In this we think the court erred as the matter of res judicata cannot be determined in that way.

The real question is whether or not the court abused its discretion. The main fact relied upon as a meritorious defense was that the lessee tendered the lessor a desirable tenant who was ready, able and willing to pay the rental stipulated for in the lease for a portion of its term in order that he might minimize his loss, and alleged that the lessee had abandoned the premises. We do not think that the lessor was bound to accept a new tenant for only a portion of the unexpired term of the lease, if he was obliged to accept the tenant at all. Hence

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VS.

J. A. HANCOCK
Applicant.

TRIAL COURT

MUNICIPAL COURT

OF CHICAGO.

1111.1.251

IN RE THE ESTATE OF J. A. HANCOCK
DECEASED

On June 11, 1917, a judgment by confession was entered herein for rent and attorney's fees. Shortly after the entry of judgment a motion was presented to have the same vacated, supported by affidavits setting up facts purporting to show a meritorious defense. A counter affidavit was filed, claiming that the right to rent under the lease had been adjudicated in a previous judgment for rent due for two previous months under the lease. The trial judge consulted the files and the record in the other case, and denied the motion, holding that the matter had been adjudicated. In this we think the court erred as the matter of res judicata cannot be determined in that way.

The real question is whether or not the court abused its discretion. The main fact relied upon as a meritorious defense was that the lessee tendered the lease a desirable tenant who was ready, able and willing to pay the rental stipulated for in the lease for a portion of its term in order that he might minimize his loss, and alleged that the lessee had abandoned the premises. We do not think that the lessee was bound to accept a new tenant for only a portion of the unexpired term of the lease. It was entitled to accept the tenant at all. Hence

we do not think the denial of the motion amounted to an abuse of discretion. The judgment will be affirmed.

AFFIRMED.

we do not think the denial of the motion warranted to an
abuse of discretion. The judgment will be affirmed.

ATTEST.

1914

The following is a list of the names of the persons who have been admitted to the bar of this court since the last report of the committee on the subject of the admission of new members to the bar. The names are given in alphabetical order of their surnames. The names of those who have been admitted to the bar of this court since the last report of the committee on the subject of the admission of new members to the bar are given in alphabetical order of their surnames. The names of those who have been admitted to the bar of this court since the last report of the committee on the subject of the admission of new members to the bar are given in alphabetical order of their surnames.

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264 - 23609

LEONARD ROCHIS,
Appellee,

vs.

VINCENT MILASCEWICZ,
Appellant.

211 I.A. 262

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This action was to recover damages for violation of an oral agreement to procure a policy of fire insurance, which the defendant denied making.

The cause was heard without a jury or submission of any propositions of law, thus leaving little basis for several of the points argued. The court's finding and judgment were in plaintiff's favor for \$800 and costs.

The points made by appellant are that there was no contract, nor proper proof of damages, no tendered premium, and negligence by appellee in not procuring a policy elsewhere.

Plaintiff testified that about February 1st, 1915, he went to the office of appellant, an insurance agent, and made application for a fire insurance policy to the amount of \$1000 on his house, on which he had previously obtained through appellant a tornado policy; that the agent then took down the data for the policy and told him the premium would be about \$35, but that he need not pay it until the policy arrived; that about March 1st he inquired of appellant whether the policy had arrived and the latter said it had not but assured him that he would get it; that his house burned up on the 29th of that

2111.A.282
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

LEONARD ROCHIE,
Appellee,

vs.

VINCENT WILKINSON,
Appellant.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This action was to recover damages for violation of an oral agreement to procure a policy of life insurance, which the defendant denied making.

The cause was heard without a jury on submission of any propositions of law, there leaving little basis for several of the points argued. The court's finding and judgment were in plaintiff's favor for \$800 and costs.

The points made by appellant are that there was no contract, nor proper proof of damages, no tendered premium, and negligence by appellee in not procuring a policy elsewhere.

Plaintiff testified that about February 1st, 1915, he went to the office of appellant, an insurance agent, and made application for a life insurance policy to the amount of \$1000 on his house, on which he had previously obtained through appellant a tornado policy; that the agent then took down the data for the policy and told him the premium would be about \$25, but that he need not pay it until the policy arrived; that about March 1st he inquired of appellant whether the policy had arrived and the latter said it had not but assured him that he would get it; that his house burned up on the 22nd of that

month. While appellant gave a different version of their conversations and differed as to the time they were had, appellee was corroborated by two witnesses. The credibility of their testimony the court below was better able to determine than we, and we cannot say that its finding was manifestly against the weight of the evidence which tended to show a contract to procure the policy and damages sustained to the amount assessed.

On the question of damages the abstract shows no objection to the evidence as finally offered on that subject, which was to the effect that the house was worth about \$2300, one thousand of which was covered by another policy held by the mortgagee of the property.

As to the premium, the payment of it was expressly waived by appellee. Its payment might be necessary to enforce the policy against the insurer but it was not necessary to the validity of an agreement with the agent to procure the policy. However, there was no proposition of law submitted on this or any other question.

We see nothing in the point of alleged negligence to procure a policy elsewhere. The evidence is to the effect that appellant induced appellee to believe that the policy had been sent for and had not arrived. Under such circumstances he might reasonably expect to receive it and receive notice from appellant when it arrived. A wait of four weeks with that expectation was not unreasonable. But no proposition of law was submitted on this subject. In the state of the record there is nothing before us for consideration except the sufficiency of the evidence to sustain the court's finding. The judgment will be affirmed.

AFFIRMED.

month. While appellant gave a different version of their conversations and differed as to the time they were had, appellee was corroborated by two witnesses. The credibility

of their testimony the court below was better able to determine than we, and we cannot say that its finding was manifestly against the weight of the evidence which tended to show a contract to procure the policy and damages sustained to the amount assessed.

On the question of damages the abstract shows no objection to the evidence as finally offered on that subject, which was to the effect that the house was worth about \$2500, one thousand of which was covered by another policy held by the mortgagee of the property.

As to the premium, the payment of it was expressly waived by appellee. Its payment might be necessary to enforce the policy against the insurer but it was not necessary to the validity of an agreement with the agent to procure the policy. However, there was no proposition of law submitted on this or any other question.

To see nothing in the point of alleged negligence to procure a policy elsewhere. The evidence is to the effect that appellant induced appellee to believe that the policy had been sent for and had not arrived. Under such circumstances he might reasonably expect to receive it and reserve notice from appellant when it arrived. A wait of four weeks with that expectation was not unreasonable. But no proposition of law was submitted on this subject. In the state of the record there is nothing before us for consideration except the sufficiency of the evidence to sustain the court's finding. The judgment will be affirmed.

211 I.A. 263

IN RE ESTATE

CHARLES H. MULLIKEN,

DECEASED.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In the administration of the ^{above} estate the Continental & Commercial National Bank of Chicago was allowed its claim of \$10,000 as a creditor of the estate, on March 12th, 1914. On April 13th, 1914, the appraisement bill fixing the widow's award at \$2,500 was filed and approved, and she made her selection the following month. On December 3rd, 1915, twenty months later, said bank filed a petition under section 75 of the administration act, to set aside and vacate the order approving the widow's award, and on April 13th, 1916, after a hearing of the petition and answer, the Probate Court entered an order reducing the award from \$2,500 to \$2,000. The widow appealed to the Circuit Court and that court on a stipulation of facts which merely recited the proceedings had in the administration of the estate in the Probate Court entered a judgment of nihil capiat and for costs against appellant. From that judgment this appeal is taken.

" The facts are very similar to those in the case of Hodson v. Hodson, 277 Ill. 137, where, reviewing a similar petition filed by a legatee fifteen months after the award, the court held that the petitioner, not having asked the aid of the court within a reasonable time, the petition should be dismissed.

ASB - 072

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THE UNIVERSITY OF CHICAGO

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In the administration of the estate the Commission
a General National Bank of Chicago was allowed its claim
of \$10,000 as a creditor of the estate, as was also, 1914.
In April 1914, the appraisement bill fixing the widow's
award at \$2,500 was filed and approved, and she made her
petition for the balance of the estate. On February 27, 1915,
twenty months later, said bank filed a petition under section
75 of the Administration Act, to set aside and vacate the
order awarding the widow's award, and on April 15, 1915,
after a hearing of the petition and answer, the probate
court entered an order refusing the award of \$2,500 to
the widow. The widow appealed to the Circuit Court and that
court on a stipulation of facts which were fully recited in the
proceedings had in the administration of the estate in the
probate court entered a judgment of affirm and for
costs against appellants. From that judgment this appeal is
taken.

The facts are very similar to those in the case
of Johnson v. Johnson, 217 Ill. 127, where, regarding a similar
petition filed by a legatee fifteen months after the award,
the court said that the petitioner, not paying notice the
end of the term within a reasonable time, the petition
should be dismissed.

The basis of the court's reasoning was that the will having been probated and the status of the legatee established, he was bound to take notice of the award and act within a reasonable time, the injury being as great to him at that time as it was when he filed his petition fifteen months afterwards. Here, too, the will had been probated and the status of the creditor, as such, established before the award was approved. The injury to a creditor as well as to a legatee would be as great then as afterwards, and his interest, we think, requires him to take notice of the award, (the statute not providing for a notice) and to act with reasonable promptness if he wishes to avail himself of the statutory right to have it reviewed. Following the Hodson case, we think the failure of said bank to seek a review of the award for twenty months calls for a dismissal of the petition. "

We need not refer to the form of the judgment below, as in any event it must be reversed with directions to dismiss the petition.

REVERSED WITH DIRECTIONS.

The basis of the court's reasoning was that the will having been produced and the estate of the deceased established, he was bound to take notice of the award and act within a reasonable time, the injury being as great to him at that time as it was when he filed his petition fifteen months afterwards. Here, too, the will had been produced and the estate of the executor, so much, established before the award was approved. The injury to a creditor as well as to a legatee would be as great then as afterwards, and his interest, we think, requires him to take notice of the award, (the statute not providing for a notice) and to act with reasonable promptness if he wishes to avail himself of the statutory right to have it reviewed. Following the Holton case, we think the failure of said bank to seek a review of the award for twenty months calls for a dismissal of the petition.

We need not refer to the form of the judgment below, as in any event it must be reversed with directions to dismiss the petition.

REVERSED WITH DIRECTIONS.

321 - 23666

CHARLEY OS-KO-MON, Appellee,

vs.

NEW YORK STAR CO., a corporation et al., On Appeal of
MARIE BEREZNIAK, Appellant.

Appeal from
Municipal Court
of Chicago.

211 I.A. 264

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The New York Star Co. sued appellee and filed an affidavit on which an attachment writ was issued and served on a garnishee. The cause coming on for trial the plaintiff was nonsuited. The attachment bond being breached thereby, suit was brought thereon and this appeal is for a judgment for \$25, being solely for legal advice and services rendered in relation to the attachment and not for defending the suit. In Damron v. Sweetser, Caldwell & Co., 16 Ill. App. 339, 344, it was held that the damages in such a case might include counsel fees for professional services rendered in relation to the attachment.

The only question raised here is whether the court was justified in finding from the undisputed evidence that the services rendered by his counsel in examining the attachment papers on file and giving advice pertaining thereto were worth the sum assessed. There being no other proof on the subject we are practically asked to find that they were worth nothing. Appellee certainly had the right to seek counsel on the matter, and the attachment not having been prosecuted, he presumably was put to unnecessary expense in seeking advice in a matter whereby he was temporarily deprived of the property attached.

The judgment will be affirmed.

AFFIRMED.

EXHIBIT 10-13-1935

Appellants,

vs.

THE NEW YORK STAR CO., INC.,
 Defendant,
 On Appeal of
 Decision of the
 Board of Taxation,
 New York City, N.Y.

Appellants from

Administrative Board

of Chicago.

STILL A. 204

THE PROSECUTOR GENERAL
 DEPARTMENT OF THE ATTORNEY GENERAL

The New York Star Co., Inc. appeals and filed on

at New York on which an attachment was issued and served
 on a garnishee. The cause coming on for trial the plaintiff
 was non-suited. The attachment being pronounced thereby,

and was brought forward and this appeal is for a judgment
 for \$25, being solely for legal advice and services rendered
 in relation to the attachment and not for defending the suit.
 In Dunham v. Westcott, Caldwell & Co., 10 Ill. App. 229, 234,

it was held that the damages in such a case might include

costs of fees for professional services rendered in relation
 to the attachment.

The only question raised here is whether the court

was justified in finding from the undisputed evidence that

the services rendered by the counsel in examining the attach-
 ment papers on file and giving advice pertaining thereto were

worth the sum assessed. There being no other proof on the

subject we are practically asked to find that they were worth
 nothing. Appellants certainly had the right to seek counsel on

the matter, and the attachment not having been prosecuted,

he presumably was not to unnecessarily expense in seeking advice

in a matter whereby he was temporarily deprived of the

property attached.

The judgment will be affirmed.

ALEXANDER H. REVELL & COMPANY,
a corporation,

Appellant,

vs.

C. H. MORGAN GROCERY COMPANY,
a corporation,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 235

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee herein has moved to dismiss the appeal, the record failing to show an order of court approving the bond. The trial judge undertook to approve it by writing his name thereon under the word "approved". That is not sufficient under the practice act to perfect an appeal, as we held in case No. 22915, Sheppard-Strassheim Co. v. Geo. Nickas et al., filed October 9th, 1917, (not yet reported). We held in that case that sections 92 and 93 of the practice act with relation to the approval of appeal bonds by an order of court or by the clerk when authorized by the court to approve them, applies, under the reasoning of Israelstam v. U. S. Casualty Co., 272 Ill. 161, to appeals from municipal courts as well as to other courts of record. The statute not having been followed the motion to dismiss will be allowed.

DISMISSED.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

ALFRED H. LEWIS & COMPANY,
a corporation,
Appellant,
vs.
O. H. KONGS GROCERY COMPANY,
a corporation,
Appellee.

111 I.A. 202

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee herein has moved to dismiss the appeal, the record failing to show an order of court approving the bond. The trial judge undertook to approve it by writing his name thereon under the word "approved". That is not sufficient under the practice act to perfect an appeal, as we held in case No. 23015, Shepard-Stressheim Co. v. Geo. Nickas et al., filed October 27th, 1917, (not yet reported). We held in that case that sections 92 and 93 of the practice act with relation to the approval of appeal bonds by an order of court or by the clerk when authorized by the court to approve them, applies, under the reasoning of Interstate v. U. S. Casualty Co., 272 Ill. 161, to appeals from municipal courts as well as to other courts of record. The statute not having been followed the motion to dismiss will be allowed.

DISMISSED.

211 I.A. 266

ARMIN W. BRAND et al.,
Defendants in Error,

vs.

JOHN H. RUETER et al.,
Plaintiffs in Error.

Error to
Circuit Court,
Cook County.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, defendants below, have prosecuted this writ of error from a decree entered in a proceeding to foreclose a certain trust deed. The identical questions presented here were passed upon by this court in a former appeal (Brand v. Rueter, 200 App. 42), in which the Supreme Court denied a writ of certiorari. We are bound by that decision but even if we were not we perceive no reason for receding from the conclusion there reached. Accordingly the decree will be affirmed.

AFFIRMED.

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CONFIDENTIAL

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U.S. JUDICIAL RECORDS DIVISION HAS LOST THE ORIGINAL OF THE ABOVE.

Plaintiffs in error, defendants below, have

Accordingly the decree will be affirmed.
Reason for reversing from the conclusion there reached.
by that decision but even if we were not so positive as
supreme court denied a writ of certiorari. We are bound
a former opinion (Grain v. Water, 100 App. 42) in which the
decisions presented have been passed upon by this court in
proceeding to reverse a certain final deed. The identical
presented this writ of certiorari - I have noted in a

1874

211 - 23177

211 I.A. 267

PAUL K. BRIMIE,
Appellee,

vs.

BELDEN MANUFACTURING COMPANY,
a corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$3200.00 recovered by Paul K. Brimie, hereinafter referred to as the plaintiff, against the Belden Manufacturing Company, hereinafter referred to as the defendant, in an action for personal injuries sustained while in its employ.

Defendant was engaged in the manufacture of insulated wire, and part of its equipment consisted of a certain rubber-heating-or mixing machine, which consisted of two horizontal cylinders, each about three feet long, sixteen inches in diameter and about three-eighths of an inch apart and was operated by power. When in motion, the top surfaces of these cylinders or rollers turned toward each other, and they were so adjusted as to revolve at different rates of speed, thereby causing friction, which in turn heated the rubber as it passed between them. The rubber was fed in pieces by hand from the top, between the two rollers, and until properly heated, the operator would reach in with his left hand at the bottom of the rollers and take the pieces of rubber out as they came through. This process was repeated until the entire mass of rubber became sticky, when it would adhere to one or the other of the rollers, after which the operator cut it off. Plain-

111 A. 207

211 - 23177

PAUL K. BRIZIE, Appellee,

vs.

BRIZIE MANUFACTURING COMPANY, a corporation, Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment

for \$200.00 recovered by Paul K. Brizie, hereinafter referred to as the plaintiff, against the Brizie Manufacturing Company, hereinafter referred to as the defendant, in an action for personal injuries sustained while in its employ.

Defendant was engaged in the manufacture of insulated wire, and part of its equipment consisted of a certain rubber-heating or mixing machine, which consisted of

two horizontal cylinders, each about three feet long, six-teen inches in diameter and about three-eighths of an inch apart and was operated by power. When in motion, the top surfaces of these cylinders or rollers turned toward each other, and they were so adjusted as to revolve at different rates of speed, thereby causing friction, which in turn heated the rubber as it passed between them. The rubber was fed in pieces by hand from the top, between the two rollers, and until properly heated, the operator would reach in with his left hand at the bottom of the rollers and take the pieces of rubber out as they came through. This process was repeated until the entire mass of rubber became sticky, when it would adhere to one or the other of the rollers, after which the operator cut it off. When-

tiff's hand was drawn in between the rollers and injured while feeding this machine. At the time of the injury, plaintiff was inexperienced in this line of work, having been in the employ of the defendant for about two days prior to the injury.

This action was brought under sec. 3 of the Workmen's Compensation Act in force May 1, 1912 (par. 5451, J. & A.) which permitted an employe to maintain a civil action against the employer, provided the injury was caused by the intentional omission of the employer to comply with statutory safety regulations.

It is urged by defendant that the evidence fails to show an intentional violation of such statutory safety regulations. We find, however, that a special interrogatory was submitted to the jury on behalf of the defendant, upon which the jury found specially that the president of the defendant company, prior to the time plaintiff sustained his injuries, intentionally omitted to comply with the statutory safety regulations applicable to the machine upon which plaintiff was injured. No motion was made by defendant to set aside this special finding of fact, nor has any error been assigned thereon. In this state of the record defendant is conclusively bound by such finding. City of Aurora v. Rocksbrand, 149 Ill. 399; Voigt v. Anglo. Am. Prov. Co., 202 Ill. 462.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

girl's hand was shown in between the rollers and injured while feeding this machine. At the time of the injury, plaintiff was inexperienced in this line of work, having been in the employ of the defendant for about two days prior to the injury.

This action was brought under sec. 5 of the Workmen's Compensation Act in force May 1, 1913 (Gen. Stat., c. 154, § 5) which permitted an employee to maintain a civil action against the employer, provided the injury was caused by the intentional omission of the employer to comply with statutory safety regulations.

It is urged by defendant that the evidence fails to show an intentional violation of such statutory safety regulations. He finds, however, that a special injury was inflicted on the jury on behalf of the defendant, upon which the jury found specially that the president of the defendant company, prior to the time plaintiff sustained his injuries, intentionally omitted to comply with the statutory safety regulations applicable to the machine upon which plaintiff was injured. No motion was made by defendant to set aside this special finding of fact, nor has any other been assigned thereon. In this state of the record defendant is conclusively bound by such finding. City of Worcester v. Boardman, 149 Ill. 500; Voigt v. Anglo Am. Trav. Co., 252 Ill. 462. There being no error in the record which justified a reversal the judgment will be affirmed.

AFFIRMED.

80 - 23411

WALTER PASK,
Appellee,

vs.

THE LONDON & LANCASHIRE
FIRE INSURANCE COMPANY,
LIMITED,
Appellant.

211 I.A. 271

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$434.30 in favor of plaintiff (appellee) in an action on an automobile theft insurance policy issued by the defendant.

The policy in question insured plaintiff against loss or damage to his automobile, therein described, by theft, robbery or pilfering, by any person or persons other than those in the employ, service or household of the insured.

The evidence on behalf of plaintiff showed that plaintiff had a summer home in Elmhurst, Illinois; that during the winter 1914-1915 he lived in Chicago, leaving his summer home in charge of one Mayer, whose sole duty was to take care of the premises and to feed the live stock and poultry thereon; that on the morning of February 10, 1915, plaintiff and his wife went to Elmhurst to inspect the premises; that they noticed the horse in the barn bore evidence of having been driven and misused, whereupon they demanded an explanation from Mayer; that shortly thereafter plaintiff left the premises in charge of his wife, with directions to discharge Mayer, while plaintiff returned to the city to get another man to take Mayer's place; that

ILLINOIS

WILLIAM PIERCE, Appellee,

vs.

THE LONDON & LANCASHIRE
INSURANCE COMPANY,
LIMITED, Appellant.

APPEAL FROM
JUDICIAL CIRCUIT
OF CHICAGO.

MR. JUSTICE HOLMES delivered the opinion for the court.

This is an appeal from a judgment for \$14,400 in favor of plaintiff (appellee) in an action on an automobile theft insurance policy issued by the defendant.

The policy in question insured plaintiff against loss or damage to his automobile, therein described, theft, robbery or kidnapping, by any person or persons other than those in the employ, service or household of the insured.

The evidence on behalf of plaintiff showed that plaintiff had a summer home in Winnetka, Illinois; that during the winter 1914-1915 he lived in Chicago, leaving his summer home in charge of one Meyer, whose sole duty was to take care of the premises and to feed the live stock and poultry thereon; that on the morning of February 10, 1915, plaintiff and his wife went to Winnetka to inspect the premises; that they noticed the horse in the barn bore evidence of having been driven and misused, whereupon they demanded an explanation from Meyer; that Meyer thereupon plaintiff left the premises in charge of his wife, with directions to discharge Meyer, while plaintiff returned to the city to get another man to take Meyer's place; that

plaintiff's wife then tendered Mayer a check covering his wages in full, and ordered him to pack up his belongings and leave at once, which he did; that subsequently plaintiff telephoned her from Chicago that their daughter was seriously ill, whereupon plaintiff's wife locked the premises, including the garage, and after feeding the horse, left for Chicago; that on the following morning when she returned to Elmhurst she found the garage door unlocked and the automobile gone; that at about three or four o'clock that afternoon Mayer returned their automobile in a battered condition, - extra tires and batteries missing, the radiator and front lamps and numerous other parts broken, and blankets soiled; that when he saw plaintiff's wife coming toward him he abandoned the car and fled; that late in the afternoon of the same day plaintiff returned with another man to care for the premises. It further appeared from the evidence that Mayer had been in plaintiff's employ about three months; that his duties did not include driving the automobile; that when plaintiff's wife ordered Mayer to leave, she forgot to demand the keys of him; that thereafter plaintiff called upon one Larson, through whom he had placed the insurance of his car with the defendant company, and informed him of the aforesaid occurrence; that Larson advised plaintiff to have the automobile towed to Chicago, which he did; that Larson then had an adjuster of the defendant company call to examine plaintiff's automobile; that at the latter's suggestion plaintiff had the car repaired.

The evidence on behalf of the defendant showed that Mayer had taken plaintiff's automobile from the garage; that he was seen driving it about the country in the vicinity of Elmhurst; that he caused it to collide with a barn, whereby

plaintiff's wife then rendered her a check covering his wages in full, and ordered him to pack up his belongings and leave at once, which he did; that subsequently plaintiff telephoned her from Chicago that their daughter was seriously ill, whereupon plaintiff's wife looked the premises, including the garage, and after feeding the horse, left for Chicago; that on the following morning when she returned to Alhambra she found the garage door unlocked and the automobile gone; that at about three or four o'clock that afternoon Mayer returned their automobile in a battered condition, - extra tires and battery missing, the radiator and front lamps and numerous other parts broken, and plates soiled; that when he saw plaintiff's wife coming toward him he abandoned the car and fled; that late in the afternoon of the same day plaintiff returned with another man to care for the premises. It further appeared from the evidence that Mayer had been in plaintiff's employ about three months; that his duties did not include driving the automobile; that when plaintiff's wife ordered Mayer to leave, she forgot to demand the keys of him; that thereafter plaintiff called upon one Larson, through whom he had placed the insurance of his car with the defendant company, and informed him of the aforesaid occurrence; that Larson advised plaintiff to have the automobile towed to Chicago, which he did; that Larson then had an adjuster of the defendant company call to examine plaintiff's automobile; that at the latter's suggestion plaintiff had the car repaired.

The evidence on behalf of the defendant showed that Mayer had taken plaintiff's automobile from the garage; that he was seen driving it about two country in the vicinity of Alhambra; that he caused it to collide with a car, whereby

the radiator and one of the fenders were broken, and that subsequently it ran into a ditch near the roadside.

It is contended by defendant, first, that there was no evidence of a felonious intent on the part of Mayer to steal the said automobile. ed

The undisputed evidence shows that Mayer's duties did not include operating plaintiff's automobile. However, after his discharge, Mayer unlocked the garage and put the batteries and other equipment on the car and drove it away, without the owner's knowledge or consent. What became of the equipment, such as the two extra tires, the batteries etc., cannot be determined except on the theory that Mayer disposed of them, as they were not on the car when it was returned. Mayer's acts are entirely consistent with the theory that he took plaintiff's automobile with a felonious intent, but owing to the accident which rendered the car unfit for further use, his plans were thwarted, whereupon he stripped the car of its equipment and returned it, taking flight when discovered by plaintiff's wife.

The next point urged is that Mayer, when he took plaintiff's automobile from the garage, was in the employ of the plaintiff, and that therefore defendant was not liable on the insurance policy. On this question the testimony offered on behalf of the plaintiff was undisputed. It showed that plaintiff's wife had discharged Mayer on the morning of February 10, 1915, prior to the time that he took plaintiff's automobile.

Other points have been raised by defendant, all of which we have considered but shall not discuss further than to say they are without merit. Accordingly the judgment will be affirmed.

AFFIRMED.

The radiator and one of the fenders were broken, and that subsequently it ran into a ditch near the roadside.

It is contended by defendant, first, that there was no evidence of a felonious intent on the part of Mayer to steal the said automobile.

The undisputed evidence shows that Mayer's duties did not include operating plaintiff's automobile. However, after his discharge, Mayer unlocked the garage and put the batteries and other equipment on the car and drove it away without the owner's knowledge or consent. That because of the equipment, such as the two extra tires, the batteries etc., cannot be determined except on the theory that Mayer disposed of them, as they were not on the car when it was returned. Mayer's acts are entirely consistent with the theory that he took plaintiff's automobile with a felonious intent, but owing to the accident which rendered the car unusable for further use, his plans were frustrated, whereupon he stripped the car of its equipment and returned it, taking flight when discovered by plaintiff's wife.

The next point urged is that Mayer, when he took plaintiff's automobile from the garage, was in the employ of the plaintiff, and that therefore defendant was not liable on the insurance policy. On this question the testimony offered on behalf of the plaintiff was undisputed. It showed that plaintiff's wife had discharged Mayer on the morning of February 10, 1915, prior to the time that he took plaintiff's automobile.

Other points have been raised by defendant, all of which we have considered but shall now discuss together. Then we say they are without merit. Accordingly the judgment will be affirmed.

131 - 23471

R. C. FOSTER,
Appellant,

vs.

EUGENIE GRAY,
Appellee.

211 I.A. 272

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment nil capiat, in an action to recover the proceeds of certain checks.

During the years 1913 and 1914 defendant operated a saloon near the Chicago stock yards. Plaintiff was engaged in business in the same neighborhood, in the purchase and sale of cattle, in the course of which he employed one Ryan, whose duties were of a general character; he kept the books, did the banking, bought and sold cattle, and accepted checks in payment thereof. It appears from the evidence that the said Ryan had authority to indorse all checks for deposit with a rubber stamp bearing the following inscription:

"Pay to the order of
Drovers Deposit National Bank.
R. C. FOSTER."

In the course of his transactions, while in the employ of plaintiff, the said Ryan indorsed plaintiff's name on numerous checks aggregating upwards of \$3,000, and cashed them with defendant, appropriating the money to his own use. Upon the discovery of the defalcation, plaintiff caused Ryan to be indicted on the charge of forgery. It appeared from the evidence that prosecution on this charge was

U.S. DEPT. OF JUSTICE

CHICAGO, ILL.

OFFICE OF THE ATTORNEY GENERAL

CHICAGO, ILL.

APPOINTMENT

AT

APPOINTMENT

THE UNITED STATES DEPARTMENT OF JUSTICE

This is an appeal by Plaintiff from a judgment
all right, in an action to recover the proceeds of certain
checks.

During the years 1911 and 1912 defendant operated
a saloon near the Chicago stock yards. Plaintiff was an-
guished in business in the same neighborhood, in the purchase
and sale of cattle, in the course of which he employed one
John, whose duties were of a general character; he kept
the books, did the banking, bought and sold cattle, and
received checks in payment thereof. It appears from the
evidence that the said John had authority to indorse all
checks for deposit with a rubber stamp bearing the following
inscriptions:

"Pay to the order of
Grover National Bank.
R. F. BOYD."

In the course of his transaction, while in the employ of
Plaintiff, the said John indorsed Plaintiff's name on
numerous checks aggregating amount of \$3,000, and cashed
them with defendant, appropriating the money to his own use.
Upon the discovery of the defalcation, Plaintiff caused
John to be indicted on the charge of larceny. It appeared
from the witness that possession on this charge was

abandoned, but that Ryan was subsequently indicted and sentenced on a plea of guilty to the charge of embezzlement.

It is contended by plaintiff that the verdict is clearly and manifestly against the weight of the evidence. However, under the law of this State, where a cause of action is based upon a crime, the degree of proof applicable to a criminal prosecution, i. e. proof beyond a reasonable doubt, is required to sustain a verdict (McInturff v. Ins. Co. of N. A., 248 Ill. 92; Germania F. I. Co. v. Klewer, 129 Ill. 599; Stecher Brg. Co. v. Carr, 194 Ill. App. 32). The basis of plaintiff's claim against defendant was, that the indorsements on the checks cashed by the latter were forged, and it is conceded that proof of such crime by Ryan was indispensable to a recovery by plaintiff. Therefore, unless we can say from an examination of the evidence that plaintiff has proven the forgery charge beyond a reasonable doubt, the judgment must be affirmed.

Certain witnesses testified to admissions made by plaintiff, in which he was alleged to have stated that Ryan was authorized to indorse checks generally. This testimony finds corroboration in the circumstance that the prosecution on the forgery indictment was abandoned and that Ryan was subsequently sentenced on a plea of guilty to the charge of embezzlement, in the opinion of the majority of this court, and raises at least a reasonable doubt as to the guilt of Ryan of the crime of forgery.

In this view of the case it becomes unnecessary to consider the other errors assigned by plaintiff. Accordingly the judgment will be affirmed.

AFFIRMED.

apartment, but that you was subsequently indicted and sentenced on a plea of guilty to the charge of embezzlement. It is contended by Plaintiff that the verdict is clearly and manifestly against the weight of the evidence. However, under the law of this State, where a crime of action is based upon a crime, the degree of proof applicable to a criminal prosecution, i. e. proof beyond a reasonable doubt, is required to sustain a verdict (Bohannon v. Ind. Co. of N. A., 248 Ill. 92; Commonwealth v. I. Co. of N. A., 124 Ill. 599; People v. Ind. Co. of N. A., 124 Ill. 599). The basis of Plaintiff's claim against defendant was, that the indictment on the charge covered by the latter was forged, and it is conceded that proof of such crime by you was indispensable to a recovery by Plaintiff. Therefore, unless you can say from an examination of the evidence that Plaintiff has proven the forgery of the latter beyond a reasonable doubt, the judgment must be affirmed.

Certain witnesses testified to statements made by Plaintiff, in which he was alleged to have stated that you was authorized to induce the same. This testimony finds corroboration in the circumstances that the prosecution on the forgery indictment was abandoned and that you was subsequently sentenced on a plea of guilty to the charge of embezzlement, and in the opinion of the majority of this court the guilt of you of the crime of forgery.

In this view of the case it seems unnecessary to consider the other errors claimed by Plaintiff. Accordingly the judgment will be affirmed.

ATTORNEYS.

IRENE M. POSVIC,
Defendant in Error,

vs.

A. C. HARFORD et al.,

HERMAN RONNAU,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 273

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment for \$800 rendered against Herman Ronnau, plaintiff in error, as damages for breach of a contract for the sale of certain real estate.

Plaintiff in error and his wife, with others, owned certain lots situated in the city of Chicago. The evidence shows that plaintiff in error instructed one Harford (who was also a defendant below), to negotiate a sale thereof, and that shortly thereafter a contract of sale was executed with the defendant in error. The said contract was executed by Harford as agent for plaintiff in error and the remaining owners in common of the said property, at an agreed price of \$4,800.00. Without further detailing the facts, it is sufficient to say that the deal was not consummated because two of the owners in common of the said property refused to join in the conveyance.

Suit was originally brought against Harford and the owners in common of the said property, but subsequently defendant in error dismissed as to all defendants except plaintiff in error, against whom the court entered the judgment herein complained of.

The court found that plaintiff in error had

JOHN M. LEWIS,
Defendant in Error,

vs.

E. J. HANCOCK & CO.,
Plaintiff in Error.

JOHN M. LEWIS,
Defendant in Error.

ORDER ON PETITION FOR
WRIT OF HABEAS CORPUS.

211 I.A. 273

THE COURT FOUND THAT PLAINTIFF IN ERROR HAD
 NOT COMPLIED WITH THE ORDER BY THE COURT.
 THE COURT THEREUPON REVERSED THE ORDER BY THE COURT.
 THIS CASE OF ERROR BRINGS UP FOR REVIEW A JUDG-
 MENT FOR \$100 RENDERED AGAINST JOHN M. LEWIS, PLAINTIFF IN
 ERROR, AS SET FORTH FOR PURPOSE OF A CONTRACT FOR SALE OF
 CERTAIN REAL ESTATE.
 PLAINTIFF IN ERROR AND HIS WIFE, WITH OTHERS,
 OWNED CERTAIN LAND ALLOCATED IN THE CITY OF CHICAGO. THE
 EVIDENCE SHOWS THAT PLAINTIFF IN ERROR INSTRUCTED ONE HAN-
 COCK (WHO WAS ALSO A DEFENDANT BELOW) TO NEGOTIATE A SALE
 THEREOF, AND THAT HANCOCK, AS TRUSTEE, A CONTRACT OF SALE WAS
 EXECUTED WITH THE DEFENDANT IN ERROR. THE SAID CONTRACT
 WAS EXECUTED BY HANCOCK AS AGENT FOR PLAINTIFF IN ERROR AND
 THE REMAINING PARTS IN CONNECTION OF THE SAID PROPERTY, AS AN
 AGREED PRICE OF \$1,000.00. WITHOUT FURTHER DETAILS THE
 FACTS ARE SET FORTH TO SAY THAT THE SALE WAS NOT COM-
 PLETED BECAUSE TWO OF THE COPIES IN CONNECTION OF THE SAID
 PROPERTY REFUSED TO JOIN IN THE CONTRACT.
 THIS WAS ORIGINALLY BRUGHT AGAINST HANCOCK AND
 THE OTHERS IN CONNECTION OF THE SAID PROPERTY, BUT SUBSEQUENTLY
 PLAINTIFF IN ERROR DISMISSED AS TO ALL DEFENDANTS EXCEPT
 HANCOCK IN ERROR. HANCOCK THEN WAS SET ASIDE AND THE JUDG-
 MENT AGAIN COMPLETED.

ordered the said Harford to make the contract of sale with defendant in error in the name of all the owners in common, assuring Harford that he (plaintiff in error) would procure the necessary deeds of conveyance to complete the sale; that the remaining owners had not authorized the execution of the said contract of sale; and that the said Harford was not liable as agent. From an examination of the evidence we are of the opinion that such findings were amply warranted.

It is insisted by plaintiff in error that inasmuch as this was an action on a written contract and service was had on all the defendants, it was improper for the court to dismiss the said defendants from the suit and enter judgment against plaintiff in error alone. Sec. 39 of the Practice Act (Par. 8576, J. & A. R. S. of Ill.) provides that amendments may be made before judgment rendered, by discontinuing as to any joint defendant and changing the form of action. (Cogshall v. Beesley, 76 Ill. 445; Kaspar v. The People, 230 Ill. 342.) It appearing from the evidence that plaintiff in error undertook to make a contract on behalf of all the owners in common of the property in question without their consent, he thereby became liable for the damages sustained by defendant in error by reason of his inability to perform the contract.

It is also contended that the damages are excessive. On the trial below it was conceded that defendant in error had a purchaser with whom she had already contracted to sell and who was ready, able and willing to pay \$5,400.00 for the said property. The measure of damages was therefore the difference between the contract price to defendant in error (\$4,800.00) and the re-sale price (\$5,400.00), or \$600.00. If defendant in error will enter a remittitur for \$200.00 within ten days

ordered the said Harford to make the contract of sale with defendant in error in the name of all the owners in common, assuming Harford that he (plaintiff in error) would procure the necessary deeds of conveyance to complete the sale; that the remaining owners had not authorized the execution of the said contract of sale; and that the said Harford was not liable as agent. From an examination of the evidence we are of the opinion that such findings were amply warranted.

It is insisted by plaintiff in error that inasmuch as this was an action on a written contract and service was had on all the defendants, it was improper for the court to dismiss the said defendants from the suit and enter judgment against plaintiff in error alone. Sec. 39 of the Practice Act (Par. 8876, U. S. A. R. C. of Ill.) provides that amendments may be made before judgment rendered, by discontinuing as to any joint defendant and changing the form of action.

(Copeland v. Beasley, 78 Ill. 445; Langer v. The People, 130 Ill. 342.) It appearing from the evidence that plaintiff in error undertook to make a contract on behalf of all the owners in common of the property in question without their consent, he thereby became liable for the damages sustained by defendant in error by reason of his inability to perform the contract.

It is also contended that the damages are excessive. On the trial below it was conceded that defendant in error had a purchaser with whom she had already contracted to sell and who was ready, able and willing to pay \$5,400.00 for the said property. The measure of damages was therefore the difference between the contract price to defendant in error (\$4,800.00) and the re-sale price (\$5,400.00), or \$600.00. If defendant in

from the date of filing this opinion, the judgment will be affirmed for \$600.00, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

from the date of filing this opinion, the judgment will be
affirmed for \$200.00, otherwise it will be reversed and
the case remanded.

APPROVED AND FORWARDED:
JAMES H. HARRIS, JR.

EMPIRE SECURITY COMPANY,
Appellant,
vs.
J. M. BERRY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for the defendant, in an action on a written guaranty.

Plaintiff's statement of claim alleged that one Lyon, being indebted to the plaintiff in the sum of \$2,000, procured an extension of time of payment of the said indebtedness, by inducing the defendant to guarantee in writing the payment of the note of the said Lyon; that the said note was not paid by Lyon at maturity, and that defendant refused to pay same. The guaranty in question was as follows:

"April 15, 1914.

"To whom it may concern:

For value received, I hereby agree that in the event that James A. Lyon does not retire at maturity (September 15, 1914) his note of \$2,000 dated this day, secured by \$7,000, par value of the stock in the Remick Pharmacal Company, I will retire the note at its face, provided the said stock is returned to me then on payment of the said \$2,000.
(signed) J. M. BERRY."

The affidavit of defense denied that defendant had offered to guarantee any indebtedness of the said Lyon, and denied that defendant had signed the alleged guaranty hereinabove set forth.

The court found that although the defendant had not himself signed the aforesaid guaranty, he had caused and authorized his name to be affixed thereto, and that he knew the said guaranty was to be used by the said Lyon for the

855. A.I.I.I.S

3248 - 335

EMPIRE SECURITY COMPANY,
Appellant,
vs.
J. E. HENRY,
Appellee.

RECEIVED THE FOLLOWING INFORMATION FROM THE BUREAU OF THE ARMY:

This is an appeal by plaintiff from a judgment for the defendant, in an action on a written guaranty. Plaintiff's statement of claim alleged that one Lyon, being indebted to the plaintiff in the sum of \$2,000, procured an extension of time of payment of the said indebtedness, by inducing the defendant to guarantee in writing the payment of the note of the said Lyon; that the said note was not paid by Lyon at maturity, and that defendant refused to pay same. The guaranty in question was as follows:

1947, 15, 15

"I am now in receipt of the note of \$2,000, per value of the stock in the Bank in Mexico Company, I will return the note at its face, provided the said stock is returned to me on payment of the said \$2,000. (signed) J. W. BERRY."

forth.

The Court found that although the defendant had not
himself signed the check, he had caused and
authorized his name to be affixed thereto, and that he knew
the said guaranty was to be used by the said Lyon for the

purpose of inducing the plaintiff to accept the latter's note for \$2,000 in settlement of his claim for \$2,000 against the said Lyon. No cross error has been assigned on any of the foregoing, although the record shows that defendant excepted to the finding that defendant had caused and authorized the said guaranty to be executed in his name.

The ruling of the court on the propositions of law submitted showed that the court based its judgment upon the theory that defendant was entitled to notice by plaintiff of its acceptance of the said guaranty, before any liability could arise thereunder. We think the court erred in so holding.

It will be noted that the guaranty hereinabove quoted recited that if the said Lyon did not retire the said note at maturity, defendant would do so etc. The word "retire" is defined in the Century dictionary as follows: "To recover; redeem; regain by the payment of a sum of money; hence, specifically, to withdraw from circulation by taking up and paying; so, to retire the bonds of a railway company; to retire a bill." The agreement of defendant was therefore to pay the said note if the said Lyon did not pay it at maturity. It did not require plaintiff to exhaust his remedies against Lyon before liability would attach against the defendant. This was an absolute guaranty of the note in question. (20 Cyc. 1408, and numerous cases there cited.) And the fact that the guaranty contained the words "To whom it may concern," by way of preamble, is immaterial. The debt guaranteed was expressly referred to in the guaranty itself and hence the preamble, "To whom it may concern," was mere surplusage. Inasmuch as the guaranty was absolute, no notice of its acceptance was necessary to make it binding upon defendant.

purpose of inducing the plaintiff to accept the latter's note for \$2,000 in settlement of his claim for \$2,000 against the said Lyon. No cross error has been assigned on any of the foregoing, although the record shows that defendant expected to the finding that defendant had caused and authorized the said guaranty to be executed in his name.

The ruling of the court on the propositions of law submitted showed that the court based its judgment upon the theory that defendant was entitled to notice by plaintiff of its acceptance of the said guaranty, before any liability could arise thereunder. We think the court erred in so ruling.

It will be noted that the guaranty hereinabove quoted recited that if the said Lyon did not retire the said note at maturity, defendant would do so etc. The word "retire" is defined in the Century Dictionary as follows: "To recover; regain; regain by the payment of a sum of money; hence, especially, to withdraw from circulation by taking up and paying; so, to retire the bonds of a railway company; to retire a bill." The agreement of defendant was therefore to pay the said note if the said Lyon did not pay it at maturity. It did not require plaintiff to exhaust his remedies against Lyon before liability would attach against the defendant. This was an absolute guaranty of the note in question. (10 Cyc. 1408, and numerous cases there cited.) And the fact that the guaranty contained the words "to whom it may concern," by way of preamble, is immaterial. The debt guaranteed was expressly referred to in the guaranty itself and hence the preamble, "to whom it may concern," was unnecessary. Inasmuch as the guaranty was absolute, no notice of its acceptance was necessary to make it binding.

It is equally well settled that where a contract of guaranty is entered into contemporaneously with the principal agreement, no notice of acceptance to the guarantor is necessary.

Furthermore, the contract of guaranty acknowledged the receipt of a valuable consideration moving from the creditor to the guarantor. No notice of acceptance is necessary to make such an agreement binding. Sears v. Swift, 66 Ill. App. 496; Taylor v. Tolman, 47 Ill. App. 264; Furst etc. Mfg. Co. v. Black, 111 Ind. 308.

However, we are of the opinion that the evidence clearly shows that the defendant received notice of the acceptance of his contract of guaranty.

It is also vigorously contended that defendant neither signed nor authorized the execution of the said guaranty. The trial court, however, specially found that the defendant had authorized the execution thereof on his behalf, and from a careful examination of the evidence we are of the opinion that it clearly sustains such finding. Inasmuch as no cross error has been assigned on this special finding, defendant is bound thereby. Farrell v. Tunnel Co., 177 Ill. App. 425; Voight v. Anglo Am. Prov. Co., 202 Ill. 462.

Accordingly the judgment of the municipal court will be reversed and judgment entered here for plaintiff in the sum of \$2,570.00, this being the amount of the Lyon note with interest thereon at the rate of seven per cent. from April 15, 1914, to the date of the filing of this opinion.

REVERSED AND JUDGMENT HERE.

It is equally well settled that when a contract of guaranty is entered into with a party, no notice of acceptance to the guarantor is necessary.

Furthermore, the contract of guaranty acknowledged the receipt of a valuable consideration owing from the creditor to the guarantor. No notice of acceptance is necessary to make such an agreement binding. Wells v. Wells, 68 Ill. App. 488; Taylor v. Taylor, 47 Ill. App. 284; First etc. Nat. Bk. v. First Nat. Bk., 111 Ind. 308.

However, we are of the opinion that the evidence clearly shows that the defendant received notice of the acceptance of his contract of guaranty.

It is also vigorously contended that defendant rather than the plaintiff authorized the execution of the said guaranty. The trial court, however, specifically found that the defendant had authorized the execution thereof on his part, and from a careful examination of the evidence we are of the opinion that it clearly sustains such finding. Inasmuch as no cross error has been assigned on this special finding, defendant is bound thereby. Wright v. Thompson Co., 177 Ill. App. 488; Wright v. First Nat. Bk. Co., 302 Ill. 482.

Accordingly the judgment of the municipal court will be reversed and judgment entered in favor of plaintiff in the sum of \$2,570.00, this being the amount of the loan note with interest thereon at the rate of seven per cent. from July 18, 1914, to the date of the filing of this opinion.

REVEREND AND JUDGMENT MADE.

213 - 23557

EDWARD F. LYONS, doing
business as Auto Tire
Sales Company,
Appellant,

vs.

UNITED STATES FIDELITY
& GUARANTY COMPANY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 280

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment nil capiat, in an action brought on a burglary insurance policy, for the value of merchandise stolen from the premises occupied by plaintiff.

By the terms of the policy in question, the defendant agreed to indemnify the plaintiff against direct loss by burglary of merchandise described therein, contained in the store, warehouse, office, loft, or rooms actually occupied by the assured, located on the main floor of the building at Nos. 1346 and 1348 South Michigan Avenue, in the city of Chicago.

The merchandise for which recovery was sought, was contained in a shed located in the rear of the premises known as No. 1350 South Michigan Avenue, which is immediately south of plaintiff's store, but there is no physical connection between them.

It is insisted by plaintiff that it was the intention of the parties that the burglary policy in question, covering the store at Nos. 1346 and 1348 South Michigan Avenue should also cover the shed in question. *cf*

It is admitted that prior to the loss, plaintiff had a conversation with the agent of the defendant, concerning insurance on the merchandise contained in the shed. The

JOHN W. LYON, doing
business as Auto Tire
Sales Company,
Plaintiff,

vs.

UNITED STATES BIDDITY
& COMPANY,
Defendant.

CHICAGO, ILL.
JANUARY 10, 1938

ILL. A. 280

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment

affirmed in an action brought on a burglary insurance

policy, to the value of merchandise stolen from the

premises occupied by plaintiff.

By the terms of the policy in question, the

defendant agreed to indemnify the plaintiff against direct

loss by burglary of merchandise stored therein, con-

tained in the store, warehouse, office, loft, or rooms

actually occupied by the insured, located on the main floor

of the building at Nos. 1346 and 1348 South Michigan Avenue,

in the city of Chicago.

The merchandise for which recovery was sought,

was contained in a shed located in the rear of the premises

known as No. 1346 South Michigan Avenue, which is immediately

south of plaintiff's store, but there is no physical connection

between them.

It is insisted by plaintiff that it was the in-

tention of the parties that the burglary policy in question

covering the store at Nos. 1346 and 1348 South Michigan

Avenue should also cover the shed in question.

It is admitted that prior to the loss, plaintiff

had a conversation with the agent of the defendant, concern-

ing insurance on the merchandise contained in the shed. The

former testified that the conversation related to burglary insurance, while defendant's agent testified that it referred to fire insurance only. After this conversation, defendant's agent, who also represented the fire insurance company that had issued certain fire insurance policies on the merchandise in the store in question, found upon investigation that the shed hereinabove referred to should have been described as being in the rear of Nos. 64 to 72 east 14th street, and that he thereupon caused the fire insurance policies to be changed so as to cover the merchandise contained in the shed as well. Had it been the intention of the parties to have the burglary insurance policy on the merchandise in the store cover the merchandise contained in the shed, it is reasonable to infer that the necessary change would have been made in the burglary policy as was done with the fire insurance policies, and that the necessity for such a change in the burglary policy must have been apparent to the plaintiff.

From a careful examination of the record, we are of the opinion that the trial court properly found that the merchandise contained in the shed in question was not intended to be, and was not included in the burglary insurance policy referred to. The risk in this case was expressly taken on the merchandise etc. contained on the main floor of the building at Nos. 1346 and 1348 South Michigan Avenue, and it cannot be extended so as to make it cover merchandise contained in the shed, to which no reference was made in the policy. Liebenstein v. Baltic Ins. Co., 45 Ill. 301.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

former testified that the conversation related to burglary insurance, while defendant's agent testified that it related to fire insurance only. After this conversation, defendant's agent, who also represented the fire insurance company, had issued during the insurance policies to the merchandise in the store as question, based upon investigation that the agent had previously referred to should have been described as being in the rear of No. 66 to 72 West 14th Street, and that he had caused the fire insurance policies to be changed so as to cover the merchandise contained in the store as well. But it seems the intention of the parties to have the burglary insurance policy on the merchandise in the store cover the merchandise contained in the store, it is reasonable to infer that the necessary change would have been made in the burglary policy as was done with the fire insurance policies, and that the necessary for such a change in the burglary policy was not necessary to the plaintiff.

From a careful examination of the record, we are of the opinion that the trial court properly found that the merchandise contained in the store in question was not intended to be, and was not included in the burglary insurance policy referred to. The risk in this case was expressly taken on the merchandise etc. contained on the main floor of the building at Nos. 1046 and 1048 South Michigan Avenue, and it cannot be extended so as to make it cover merchandise contained in the store, to which no reference was made in the policy. Indemnity v. Nettle Iron Co., 42 Ill. 101. Finding no reversible error in the record, the judgment will be affirmed.

APPROVED.

EARLINE DURRELL,
Plaintiff in Error,

vs.

ROBERT T. DURRELL,
Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error, plaintiff in error seeks a reversal of a decree of court dismissing for want of equity her petition for restoration of a decree for alimony.

On March 31, 1904, plaintiff in error obtained from defendant in error a decree of divorce which provided for an allowance to her of \$25.00 per month as alimony. On February 2, 1907, upon a hearing the court found plaintiff in error guilty of leading a life of prostitution and ordered that payment of alimony be discontinued after the month of January, 1907. On December 5, 1907, on a rule to show cause why defendant in error should not be punished for contempt of court for failing to pay alimony, the court found the sum of \$50.00 due, - presumably for alimony accruing prior to February 1, 1907 - and entered an order reciting the payment thereof to the plaintiff in error in open court, and her acceptance thereof in full of all claims and demands against defendant in error, arising out of the said decree for alimony. Said order also contained the following recital:

"Now, therefore, by the consent of all the parties hereto, it is ordered, adjudged and decreed that the said Robert T. Durrell be and he is hereby discharged and released from and against any and all manner of claims which the said Earline Durrell has or might have against him by reason of any order or decree of this court heretofore entered herein, or by reason of any other matter or thing whatsoever.

"It is further ordered that this cause be dismissed and that no further proceedings be had herein.

CARPENTER, Judge.

1881 A. 231

ROBERT T. MURPHY, Plaintiff in Error,
vs.
ROBERT T. MURPHY, Defendant in Error.

NOT TO
CIRCUIT COURT,
DOCK COUNTY.

MR. JUSTICE DONALD delivered the opinion of the court.

By this writ of error, plaintiff in error seeks reversal of a decree of court dissolving her marriage for want of equity her petition for restoration of a decree for alimony.

On March 21, 1907, plaintiff in error obtained

from defendant in error a decree of divorce which provided for an allowance to her of \$25.00 per month as alimony. On

February 3, 1907, upon a hearing the court found plaintiff in error guilty of leading a life of prostitution and ordered that payment of alimony be discontinued after the month of

January, 1907. On December 2, 1907, on a rule to show cause

why defendant in error should not be punished for contempt

of court for failing to pay alimony, the court found the sum

of \$50.00 due, - presumably for alimony accruing prior to

February 1, 1907 - and entered an order reciting the payment

thereof to the plaintiff in error in over \$50.00, and that

acquiescence be entered in full of all claims and demands against

defendant in error, arising out of the said decree for alimony.

Said order also contained the following recital:

"Now, therefore, by the consent of all the parties hereto, it is ordered, adjudged and decreed that the said Robert T. Murphy be and he is hereby discharged and released from and against any and all manner of claims which the said Marjorie Curran has or might have against him on account of any order or decree of said court heretofore entered herein, or by reason of any other matter or thing whatsoever."

"It is further ordered that this cause be dismissed and that no further proceedings be had herein."

"The above order is satisfactory to me and I request the court to enter the same.

EARLINE DURRELL.

"O. K.:

Blum & Blum,
Solicitors for Earline Durrell."

It is insisted by plaintiff in error that the orders of February 2, 1907 and December 5, 1907 were void, for the alleged reason that at the time of their entry the court had lost jurisdiction of the subject matter and that hence her petition seeking restoration of alimony was erroneously dismissed. 94

The power of a court to change its decree requiring payment of alimony out of the future earnings of the husband is sustained in the case of Cole v. Cole, 142 Ill. 19, in which the court said, p. 29:

* * * "and it might be, under these circumstances, unconscionable to compel the husband, by his daily labor, to support his divorced wife in idleness and prostitution. Not only reasons of justice, but authority, would seem to justify the court, in such a case, in the exercise of its general chancery powers, to modify or revoke its former order."

Furthermore, plaintiff in error, by the order of December 5, 1907, which recited that it was entered with her consent and at her request, is now precluded from questioning the validity thereof. It follows, therefore, that the court properly dismissed the petition in question for want of equity. Accordingly the decree will be affirmed.

AFFIRMED.

"The above order is satisfactory to me and I request the court to enter the same."
KARLIS LUNDIN.

"O. L. L."
Blum & Blum,
Solicitors for Karlis Lundin.

It is insisted by plaintiff in error that the orders of February 2, 1907 and December 5, 1907 were valid, for the alleged reason that at the time of their entry the court had lost jurisdiction of the subject matter and that hence her petition seeking restoration of alimony was erroneously dismissed.

The power of a court to change its decree regarding payment of alimony out of its future earnings of the husband is contained in the case of Eola v. Eola, 143 Ill. 19, in which the court said, p. 20:

"* * * and it might be, under these circumstances, unconscionable to compel the husband, by his daily labor, to support his divorced wife in idleness and prostitution. Not only reasons of justice, but authority, would seem to justify the court, in such a case, in the exercise of its general and necessary powers, to modify or revoke its former order."

Furthermore, plaintiff in error, by the order of December 5, 1907, which recited that it was entered with her consent and at her request, is now precluded from questioning the validity thereof. It follows, therefore, that the court properly dismissed the petition in question for want of equity. Accordingly the decree will be affirmed.

APPROVED.

233 - 23578

JOHN V. ZELEZNY, Administrator
of the estate of Frank Brehovsky,
deceased,

Appellant,

vs.

BIRK BROTHERS BREWING COMPANY,
a corporation, and EMANUEL T.
NAPIERALSKI,

Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

211 I.A. 282

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant brought this action as administrator of the estate of Frank Brehovsky, deceased, to recover damages from defendants for negligently causing his death. At the close of plaintiff's case, each defendant made a motion for a directed verdict, both of which said motions were denied by the court. At the close of all the evidence similar motions were made by both defendants for directed verdicts in their favor, which the court also denied. During the argument to the jury, the court intervened and on its own motion directed a verdict in favor of both defendants, and from the judgment rendered thereon plaintiff has prosecuted this appeal.

The accident occurred in the neighborhood of Paulina street and Eighteenth place, in the city of Chicago. Paulina street runs north and south and is intersected at right angles by Eighteenth place, which runs east and west. Funeral services were being held at a church situated at the northwest corner of said intersection. Plaintiff's intestate was in charge of the hearse, which was backed against the west curb of Paulina street, just north of Eighteenth place. The horses attached thereto stood at right angles to the hearse and

John V. Kennedy, Administrator
of the estate of Frank Kennedy,
deceased,

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

vs.
JACK BROTHMAN BREWING COMPANY,
a corporation, and
RAPHAEL J. BROTHMAN,
Appellants.

233 A 111

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant brought this action as administrator

of the estate of Frank Kennedy, deceased, to recover

damages from defendant for negligently causing his death.

At the close of plaintiff's case, defendant made a

motion for a directed verdict, both of which said motion

were denied by the court. At the close of all the evidence

similar motions were made by both defendant for directed

verdicts in their favor, which the court also denied. There-

fore, the case came to the jury, the court intervening and on

its own motion directed a verdict in favor of both defendants,

and from the judgment rendered thereon plaintiff has prosecuted

this appeal.

The accident occurred in the neighborhood of

Paulina Street and Eighteenth Place, in the city of

Chicago. Paulina Street runs north and south and is inter-

sected at right angles by Eighteenth Place, which runs

east and west. Tunnel services were being held at a

church situated at the northeast corner of said inter-

section. Plaintiff's intestate was in charge of the

horses, which were backed against the west curb of Paulina

Street, just north of Eighteenth Place. The horses

attached thereto took at this point to the highway and

faced south. Paulina street at this particular place is 38 feet wide from curb to curb, and the evidence shows that carriages were lined up on both sides of the street.

The defendant brewing company's motor truck was moving north on the east side of Paulina street. At it approached Eighteenth place, the horses attached to the hearse became restless and showed signs of fright, whereupon plaintiff's intestate raised his hand to indicate this fact to the driver of the said truck, after which the truck proceeded a short distance across Eighteenth place and came to a full stop at the northeast corner of the said intersection. At about this time defendant Napieralski's automobile, which was moving south on Paulina street, approached the hearse, and stopped just opposite the horses. Thereupon the horses reared, backed the hearse up on the curb, ran south on Paulina street, and collided with a carriage, which caused the hearse to upset, throwing plaintiff's intestate to the ground, whereby he sustained injuries which a short time later proved fatal.

The declaration contained several charges of negligence against both defendants in the operation of their respective motor vehicles. The fourth count alleged that defendants carelessly and negligently drove their vehicles nearer the said hearse and team than was necessary and so close thereto that the team attached to the said hearse became frightened and ran away.

On behalf of the plaintiff, the witness Wrazek testified that defendant Napieralski's automobile came in front of the team, scraping the tip of the pole to which the horses were attached. His testimony on this point was as follows:

faced south. Looking street at this particular place is
 38 feet wide from curb to curb, and the evidence shows
 that curbs were lined up on both sides of the street.
 The defendant driving company's motor truck was
 moving north on the west side of Looking street. At it
 approached lighted place, the horses attached to the
 harness became restless and showed signs of fright, where-
 upon plaintiff's intestate raised his hand to indicate this
 fact to the driver of the said truck, after which the
 truck proceeded a short distance west of lighted place
 and came to a full stop at the northeast corner of the
 said intersection. At about this time defendant's automobile,
 which was moving south on Looking street, ap-
 proached the horses, and stopped just opposite the horses.
 Thereupon the horses started, passed the truck up on the curb,
 ran north on Looking street, and collided with a carriage,
 which caused the horses to upset, throwing plaintiff's
 intestate to the ground, whereby he sustained injuries which
 a short time later proved fatal.

The declaration contained several charges of
 negligence against both defendants in the operation of their
 respective motor vehicles. The fourth count alleged that
 defendants carelessly and negligently drove their vehicles
 near the said horses and team when was necessary and so
 close that the team attached to the said horses
 became frightened and ran away.
 On behalf of the plaintiff, the witness Frank
 testified that defendant's automobile was in front of the team,
 scraping the tip of the pole to
 which the horses were attached. His testimony on this
 point was as follows:

"He came all the way to the front of the team, came in front of the hearse team, scraping the tip of the pole of the hearse. When he done that, the horses swung west as far as the curb, backing up the hind part of the hearse on the sidewalk as far as the front wheels touched the curb, then breaking the pole." * * *

There was also testimony as to the speed at which both motor vehicles were proceeding just prior to the accident, the consensus of which was that they were both moving slowly.

It is contended by plaintiff that the court erred in directing a verdict for defendants. *pl*

The rule is that where a motion to direct a verdict for the defendant is presented to the court, the evidence most favorable to the plaintiff must be considered as true, with all reasonable inferences that can be drawn therefrom; and if from such evidence, standing alone, it can be reasonably said or inferred that it proves the material averments of the declaration, a verdict for the defendant should not be directed. (Devine v. Delano, 272 Ill. 166.) In the case at bar there was evidence which, standing alone, would tend to show that defendant Napieralski's automobile was driven so close to the horses as to scrape the end of the pole to which they were attached. From such evidence, standing alone, we think the question whether the horses became frightened because of the close proximity of defendant Napieralski's automobile to them was one of fact for the determination of the jury, and the court erred in directing a verdict for said defendant. *>*

Cross error has been assigned upon the ruling of the court in denying the defendant brewing company's motion for a directed verdict in its favor at the close of plaintiff's case.

Defendant brewing company having elected to *>*

"The came all the way to the front of the team, came in front of the horses team, carrying the tip of the pole of the harness. When he done that, the horses swung west as far as the corp, backing up the hind part of the horses of the sidewalk as far as the front wheels touched the corp, then breaking the pole." * * *

There was also testimony as to the speed at which both motor vehicles were proceeding just prior to the accident, the occurrence of which was that they were both moving slowly.

It is contended by plaintiff that the court erred in directing a verdict for defendant.

The rule is that where a motion to direct a ver-

dict for the defendant is presented to the court, the evidence most favorable to the plaintiff must be considered as true, with all reasonable inferences that can be drawn therefrom;

and if from such evidence, standing alone, it can be reasonably said or inferred that it appears that the defendant should not be liable.

(Griffin v. Leland, 273 Ill. 180.) In the case at bar there

was evidence which, standing alone, would tend to show that

defendant Napier's automobile was driven so close to

the horses as to scrape the end of the pole to which they

were attached. From such evidence, standing alone, we think

the question whether the horses became frightened because

of the close proximity of defendant Napier's automobile

to them was one of fact for the determination of the jury,

and the court erred in directing a verdict for said defendant.

Griffin error has been avoided in the ruling

of the court in denying the demand of plaintiff's

motion for a directed verdict in the favor of the close

of plaintiff's case.

Defendant brewing company having elected to

stand by its motion for a directed verdict made at the close of plaintiff's case, its rights thereunder must be determined as of the time when the motion was made, notwithstanding the defendant Napieralski subsequently introduced evidence on his own behalf. (Condon v. Schoenfeld, 214 Ill. 226.) In our opinion, there was no evidence in the record at the close of plaintiff's case which, standing alone, would warrant the inference that the defendant brewing company was guilty of any negligence which caused or contributed to cause the injury in question, and hence the court erred in denying its said motion. However, under the rule in this State, a judgment in favor of joint defendants is a unit, and a reversal as to one requires a reversal as to all. McDonald v. Wilkie, 13 Ill. 22; Seymour v. Richardson Fueling Co., 205 Ill. 77.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

stand by its motion for a directed verdict made at the close of plaintiff's case, its right thereunder must be determined at the time when the motion was made, notwithstanding the defendant's subsequent introduction of evidence on his own behalf. (Gordon v. Rosenfeld, 214 Ill. 236.) In our opinion, there was no evidence in the record at the close of plaintiff's case which, standing alone, would warrant the inference that the defendant printing company was guilty of any negligence which caused or contributed to cause the injury in question, and hence the court erred in denying its said motion. However, under the rule in this State, a judgment in favor of joint defendants is a writ, and a reversal as to one respondent a reversal as to all. (McDonald v. Kirk, 12 Ill. 23; Seymour v. Richardson Mailing Co., 202 Ill. 97.)

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.
 REVERSED AND REMANDED.

211 I.A. 284

ROBERT SCHRAYER, doing
business as M. SCHRAYER'S
SONS & COMPANY,

Appellee,

vs.

C. DOERING & SON, a cor-
poration,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, from a judgment for \$250.23 entered by default after defendant's affidavit of defense had been stricken from the files, the court holding that it failed to state any legal grounds of defense to plaintiff's action.

Plaintiff's statement of claim alleged that defendant was indebted to him in the sum aforesaid, for goods, wares and merchandise delivered as per itemized statement attached. Under the so-called simplified form of pleadings in the municipal court, plaintiff was also permitted to file a written contract entered into between the parties hereto, bearing the notation, "instrument sued on," which purported to cover the merchandise mentioned in plaintiff's statement of claim, but which also contained a provision requiring the plaintiff to deliver a much larger quantity of merchandise within the time and at the price therein mentioned. An inspection of the itemized statement of claim and a comparison with the contract sued on disclose that shipments were not made within the time nor in the amounts provided for by the said contract.

888 A 284

246 - 23521

ROBERT SCHRAVER, doing
business as W. SCHRAVER'S
SONS & COMPANY,
Appellee,

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

C. DORRING & SON, a cor-
poration,
Appellant.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, from a judg-

ment for \$250.00 entered by default after defendant's
affidavit of defense had been stricken from the files, the
court holding that it failed to state any legal grounds
of defense to plaintiff's action.

Plaintiff's statement of claim alleged that
defendant was indebted to him in the sum aforesaid, for
goods, wares and merchandise delivered as per itemized
statement attached. Under the so-called simplified form
of pleadings in the municipal court, plaintiff was also
permitted to file a written contract entered into between

the parties hereto, bearing the notation, "instrument
used on," which purported to cover the merchandise mention-
ed in plaintiff's statement of claim, but which also con-
tained a provision requiring the plaintiff to deliver a much
larger quantity of merchandise within the time and at the
price therein mentioned. An inspection of the itemized
statement of claim and a comparison with the contract used
on disclose that shipments were not made within the time
nor in the amounts provided for by the said contract.

Defendant's affidavit of defense stated in substance that certain items mentioned in plaintiff's statement of claim were samples furnished gratis to the defendant and that owing to an advance in the price of the merchandise mentioned in the contract sued on, plaintiff failed to make delivery thereof as by said contract provided, and that by reason of plaintiff's said breach of contract the defendant was obliged to purchase said merchandise elsewhere at an advance over the contract price; that by reason thereof defendant sustained damages in an amount in excess of plaintiff's claim for the merchandise delivered; that at the times when payment by defendant became ^{due} according to the terms of the said agreement for the merchandise delivered, defendant offered the plaintiff to set off against the amounts due for such merchandise, damages therein sustained by reason of plaintiff's nondelivery of merchandise as aforesaid.

Clearly, this affidavit stated a good defense as to the amount of merchandise claimed to have been delivered gratis as samples. If the affidavit set forth a legal defense as to any part of plaintiff's claim, it was error for the court to strike it from the files. (American Hard Rubber Co. v. Howe, 280 Ill. 431.) Defendant alleged in its affidavit of defense that plaintiff had defaulted in the performance of his contract, as a result of which it sustained damages in excess of the value of the merchandise actually delivered, and offered to set off such damages (which appeared to be liquidated) against the installments due. This in our opinion stated a good defense to plaintiff's claim. (Bradley v. King, 44 Ill. 339; Harber Bros. Co. v. Moffat Cycle Co., 151 Ill. 84.) It follows, therefore, that the court erred in striking the said affidavit

fore, that the court erred in striking the said affidavit
 Co. v. Wolff Cycle Co., 101 Ill. 84.) It follows, there-
 fore, that the court erred in striking the said affidavit
 due. This in our opinion stated a good defense to plain-
 tiff's claim. (Harper Bros. v. King, 44 Ill. 323; Harper Bros.
 actually delivered, and offered to set off such damages
 sustained damage as in excess of the value of the merchandise
 the performance of his contract, as a result of which it
 its affidavit of defense that plaintiff had defaulted in
Harper Co. v. Howe, 280 Ill. 431.) Defendant alleged in
 for the court to strike it from the files. (American Hard
 defense as to any part of plaintiff's claim, it was error
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 to the amount of merchandise claimed to have been delivered
 Clearly, this affidavit stated a good defense as
 plaintiff's nondelivery of merchandise as aforesaid.
 such merchandise, damages therein sustained by reason of
 offered the plaintiff to set off against the amount due for
 the said agreement for the merchandise delivered, defendant
 when payment by defendant became ^{due} according to the terms of
 tiff's claim for the merchandise delivered; that at the time
 defendant sustained damages in an amount in excess of plain-
 advance over the contract price; that by reason thereof
 was obliged to purchase said merchandise elsewhere at an
 reason of plaintiff's said breach of contract the defendant
 delivery thereof as by said contract provided, and that by
 mentioned in the contract sued on, plaintiff failed to make
 and that owing to an advance in the price of the merchandise
 ment of claim were samples furnished gratis to the defendant
 stance that certain items mentioned in plaintiff's state-
 Defendant's affidavit of defense stated in sub-

of defense from the files and in entering a default judgment against defendant. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

of defense from the files and in entering a default judgment against defendant. Accordingly the judgment will be reversed and the cause remanded.

REVEREND AND REMANDED.

211 I.A. 294

JOHN F. DEVINE, Administrator
of the estate of Rudolph
Kramp, deceased,

Defendant in Error,

vs.

MANDO RAMMESATHI,

Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below as administrator sued under the statute for alleged negligence causing the death of his intestate, a boy about five years of age who left him surviving father and mother, and brothers and sisters.

The declaration alleged and the proof showed that a servant of the defendant while working for the defendant within the scope of his employment, left a team of horses attached to a wagon standing unfastened and unguarded in a public street in the city of Chicago contrary to the provisions of an ordinance of the city; that the team ran into a sidewalk upon which deceased was playing, causing injuries which resulted in his death.

A jury found the defendant guilty and assessed plaintiff's damages at the sum of \$3000 on which verdict a judgment was entered.

We have examined all the reasons urged by appellant as ground for reversal and are of the opinion that they are without merit.

The judgment is not excessive. The proof showed beyond doubt that the servant of defendant was negligent and that the death of the deceased resulted from injuries sustained by reason thereof. There was no proof from which

44-21357

ADMINISTRATOR
COURT
COURT

JOHN V. BARKER, Administrator
of the estate of
BARKER, deceased,
Defendant in Error,

vs.

ERNEST BARKER, Plaintiff in Error.

THE JUDGE HAS NOTED THE OPINION OF THE COURT.

Plaintiff below as administrator sued under the

statute for alleged negligence causing the death of his
infant, a boy just five years of age who left his
surviving father and mother, and brothers and sisters.
The description alleged and the proof shows

that a servant of the defendant while working for the
defendant within the scope of his employment, left a team
of horses attached to a wagon standing unattended and un-
guarded in a public street in the city of Chicago contrary
to the provisions of an ordinance of the city; that the
team ran into a sidewalk upon which deceased was playing,
causing injuries which resulted in his death.

A jury found the defendant guilty and assessed
plaintiff's damages at the sum of \$2000 which verdict a
judgment was entered.

We have examined all the records upon appeal and
are of opinion that the judgment is correct and that it was
without error.

The judgment is not excessive. The proof shows
beyond doubt that the servant of defendant was negligent and
that the death of the deceased resulted from injuries sus-

contributory negligence on the part of the parents could be inferred.

Complaint is made that the court denied defendant's motion for leave to withdraw a juror. Defendant claimed surprise by reason of the death of a stenographer who had taken the testimony of one of plaintiff's witnesses as given at the coroner's inquest. Defendant wished by the stenographer's notes to impeach the testimony of this witness. It was made to appear, however, that the testimony of plaintiff's witness as given at the inquest might have been obtained from the official record of the coroner. That would have been the best evidence.

We think, therefore, there was no error in denying defendant's motion. (Overtown v. C. & E. I. R. R. Co., 181 Ill. 323. The judgment of the Circuit Court will be affirmed.

AFFIRMED.

...the only evidence in the part of the ...

Complaint is made that the court failed to follow the
motion for leave to withdraw a juror. Defendant claimed was
prize by reason of the death of a witness rather than taken
the testimony of one of Plaintiff's witnesses as given to the
coroner's inquest. Defendant wished by the stenographer's
note to impugn the testimony of this witness. It was made
to appear, however, that the testimony of Plaintiff's witness
as given at the inquest did not have been obtained from the
official record of the coroner. There could have been the cor-

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III. 608. The fragment of the ancient Greek

• 1994

QUESTIONS

THORDORSON ELECTRIC MANUFACTURING
COMPANY, a corporation,
Appellant,

vs.

HUB ELECTRIC COMPANY, a corporation,
Appellee.

)
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.
)

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant who was plaintiff below, sued appellee for the price of five hundred 3 way ringers furnished by plaintiff to defendant September 8th, 1916, at the agreed price of \$375.00.

The affidavit of merits denied any indebtedness and set up that the goods were ordered from the Inland Electric Company, "the agent of the plaintiff"; that they were defective and faulty and that said Inland Electric Company was notified and took back the said goods and no other goods had been delivered in place thereof.

The evidence for plaintiff proved a contract in writing between plaintiff and defendant dated April 27th, 1916, whereby it ordered 1,000 three way transformers at 75 cents each to be taken in twenty months from date "as ordered by us".

After the making of this contract, plaintiff's manager called up defendant and asked if the first 100 transformers under the contract might be billed through the Inland Electric Company, a jobber in electrical supplies with whom plaintiff had a contract which gave the Inland Electric Company the exclusive agency of the sale of these

211 A. 286

INVESTMENT ELECTRIC MANUFACTURING
COMPANY, a corporation,
Appellant,
vs.
NEW ELECTRIC COMPANY, a corporation,
Defendant.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

Appellant who was plaintiff below, sued appellee for the price of five hundred 2 way ringers furnished by plaintiff to defendant beginning 2nd, 1918, at the agreed price of \$375.00.

The affidavit of merits denied any indebtedness and set up that the goods were ordered from the Inland Electric Company, "the agent of the plaintiff"; that they were defective and faulty and that said Inland Electric Company was notified and took back the said goods and no other goods had been delivered in place thereof.

The evidence for plaintiff proved a contract in writing between plaintiff and defendant dated April 27th, 1916, whereby it ordered 1,000 three way transformers at 75 cents each to be taken in twenty months from date "as ordered by us".

After the making of this contract, plaintiff's manager called up defendant and asked if the first 100 transformers under the contract might be billed through the Inland Electric Company, a jobber in electrical supplies with whom plaintiff had a contract which gave the Inland Electric Company the exclusive agency of the sale of these

goods. The defendant consented and the first 100 transformers were billed to defendant through the Inland Electric Company and the defendant made payment for the goods to it.

On September 7th, 1916, the Inland Electric Company at the request of the defendant made a requisition on the plaintiff to ship defendant 500 transformers. There had been some dissatisfaction expressed by both parties to the contract between the Inland Electric Company and the plaintiff, and upon receipt of this requisition, plaintiff called up the defendant and asked if the goods might be sent and billed to it direct, and receiving an affirmative reply, plaintiff so billed and delivered the goods. Defendant's receiving clerk receipted for the goods as follows:

"Original

Chicago 9/8/16.

Received in good order of Thordarson Electric
Mfg. Co., 501-515 South Jefferson Street,

To Hub Electric Co.,
1819 Carroll Ave.,

Customer's No. A 9152

No. of packages.

10 boxes

Articles

500 - 3 Way Transformers

James Brown."

The evidence of defendant shows that after the receipt of these goods, defendant made a claim to the Inland Electric Company that they were defective and after some negotiations the Inland Electric Company without consulting plaintiff agreed to an allowance of 7 cents a piece upon each instrument because thereof.

The alleged defects were remedied by defendant, the Inland Electric Company, furnishing wire for that pur-

Goods. The defendant contacted and the first two transformers were billed to defendant through the Inland Electric Company and the defendant made payment for the goods to it.

On September 7th, 1916, the Inland Electric Company at the request of the defendant made a repudiation on the plaintiff to ship defendant 500 transformers. There had been some dissatisfaction expressed by both parties to the contract between the Inland Electric Company and the plaintiff, and upon receipt of this repudiation, plaintiff called up the defendant and asked if the goods might be sent and billed to it direct, and receiving an affirmative reply, plaintiff so billed and delivered the goods. Defendant's receiving clerk receipted for the goods as follows:

"Original Chicago 7/8/16.

Received in your order of Transformer Electric Mfg. Co., 501-515 North Jefferson Street,

To Hub Electric Co.,
1812 Carroll Way,

Customer's No. A 9133

No. of packages.

10 boxes

500 - 3 Way Transformers

James Brown.

The evidence of defendant shows that after the receipt of these goods, defendant made a claim to the Inland Electric Company that they were defective and after some negotiation the Inland Electric Company without consulting plaintiff agreed to an allowance of 7 cents a piece upon each transformer because thereof.

The alleged defects were remedied by defendant, the Inland Electric Company, furnishing wire for that pur-

pose. There was no evidence that the transformers were in fact defective in that they differed from the articles agreed to be delivered in the original contract between plaintiff and defendant. The witnesses for the defendant agreed with those of plaintiff that although the order was made through the Inland Electric Company, the goods were to be delivered on the original contract as made between plaintiff and defendant.

The court found the issues for the defendant and entered judgment on the finding. Appellee here contends that the evidence shows that the goods were ordered by appellee from the Inland Electric Company and not the plaintiff, but appellee dealt with the Inland Electric Company and not the plaintiff and insists that appellant was a total stranger to the transaction.

We have carefully considered the evidence, not alone as abstracted, but in the record. We cannot agree with the contention of appellee, but on the contrary think that the transaction was clearly between the plaintiff and defendant, and on that evidence plaintiff was entitled to recover from the defendant \$375.00 for the goods.

The Inland Electric Company is not a party to this suit. Its rights are determined by its written contract with the plaintiff on which it has its remedy in case it has been legally wronged.

Upon the evidence the plaintiff, appellant, was entitled to recover \$375.00 the contract price of the goods sold and delivered. The judgment of the trial court will be reversed and judgment in favor of appellant and against appellee entered here for the amount due.

REVERSED WITH JUDGMENT HERE.

power. There was no evidence that the transactions were in fact not alive in that they differed from the articles agreed to be delivered in the original contract between plaintiff and defendant. The witnesses for the defendant agreed with those of plaintiff that although the order was made through the Island Electric Company, the goods were to be delivered on the original contract as made between plaintiff and defendant.

The court found the issue for the defendant and entered judgment on the finding. Appellee has contended that the evidence shows that the goods were ordered by appellee from the Island Electric Company and not the plaintiff, but appellee dealt with the Island Electric Company and not the plaintiff and insists that appellee was a total stranger to the transaction.

We have carefully considered the evidence, not alone as presented, but in the record. We cannot agree with the contention of appellee, but on the contrary think that the transaction was clearly between the plaintiff and defendant, and on that evidence plaintiff was entitled to recover from the defendant \$25.00 for the goods.

The Island Electric Company is not a party to this suit. Its rights are determined by its written contract with the plaintiff on which it has its remedy in case it has been legally wronged.

Upon the evidence the plaintiff, appellee, was entitled to recover \$25.00 the contract price of the goods sold and delivered. The judgment of the trial court will be reversed and judgment is given in favor of plaintiff and against appellee entered here for the amount due.

FINDING OF FACTS.

The court finds that on the 8th day of September, 1916, appellee Hub Electric Company ordered from the appellant, Thorderson Electric Company, a corporation, 500 transformers at the price of 75 cents each and that the same were at the request of appellee, Hub Electric Company, delivered to it on or about that date; that appellee, Hub Electric Company, has not paid for the same and that prior to the time of the beginning of this suit there was due to the Thorderson Electric Company, a corporation, from the Hub Electric Company the sum of \$375.00 therefor.

THE END OF THE MATTER.

The court finds that on the 20th day of September,

1916, appellee The Electric Company obtained from the appellant, The Electric Company, a corporation, 5000 shares of the stock of 10 cents each and that the same were at the request of appellee, The Electric Company, delivered to it on or about that date; that appellee, The Electric Company, has not paid for the same and that prior to the time of the beginning of this suit there was due to the The Electric Company, a corporation, from the The Electric Company the sum of \$575.00 interest.

211 I.A. 297

MRS. LOUIS A. HERBERT,
Appellee,

vs.

W. C. MAHON COMPANY, a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment rendered upon trial before the court without a jury.

The evidence for the plaintiff tended to show that the defendant was a manufacturing furrier and that plaintiff was unacquainted with the quality of such goods; that she had been recommended to the defendant by a friend and informed defendant of that fact when she visited its store the latter part of August, 1916, for the purpose of purchasing an Alaska sealskin coat.

Defendant had none of these goods and requested her to return the next day which she did. She was then shown the skins from which the coat was thereafter made. She was informed by the salesman that the skins were "Rice dyed" and they appeared to have the Rice stamp upon them. She was informed by the salesman that these dyes were the "best in the world"; that the skins were dyed with them and that they were the "best that money could buy".

Plaintiff testifies that she relied upon the promises and judgment of appellant, and after negotiations agreed to purchase the garment complete for the sum of \$1050.00.

A model of the coat was made in cloth showing the design of it, which plaintiff tried on and found to fit.

211 A. 387

APPEAL FROM
CIRCUIT COURT
OF CHICAGO.

W. C. BARNES COMPANY, a corporation,
Appellant,
vs.
W. L. LOUIS A. LEBLANC,
Appellee.

MR. JUSTICE SULLIVAN delivered the opinion of the court.

The defendant appeals from a judgment rendered upon trial before the court without a jury. The evidence for the plaintiff tended to show that the defendant was a manufacturing business and that plaintiff was associated with the quality of such goods; that she had been recommended to the defendant by a friend and informed defendant of that fact when she visited its store the latter part of August, 1916, for the purpose of purchasing an Alaskan coat.

Defendant had none of these goods and requested her to return the next day which she did. She was then shown the skins from which the coat was to be made. She was informed by the salesman that the skins were "Alce dyes" and they appeared to have the Alce stamp upon them. She was informed by the salesman that these dyes were the "best in the world"; that the skins were dyed with them and that they were the "best that money could buy".

Plaintiff testifies that she relied upon the promises and judgment of appellant, and after negotiations agreed to purchase the garment complete for the sum of \$1000.00. A model of the coat was made in cloth showing the design of it, which plaintiff tried on and found to fit.

The coat itself was completed by the latter part of December. Plaintiff tried it on at defendant's store and two slight alterations were made. The next morning she called for the coat, but did not try it on. A lady employee, however, put the coat on and plaintiff looked at it. It was then carried by defendant's salesman to plaintiff's automobile and she took it away.

The coat was first worn on New Year's eve and on the following day plaintiff observed that the car in which she had been riding was "just littered with dye, black all over." In the afternoon she looked at her evening dress and slippers which she wore the night before and "they were as black as they could be, littered with black all over, the evening dress, the slippers and everything just littered, the bed where I laid them on, the bedspread was so black - well, it has been boiled and washed and we never got it out."

Complaint was made to the defendant and at its request the coat was returned. It was sent to plaintiff again, but as she testifies, "seemed to get worse with the cleaning. The hair and everything seemed to come off worse than before. With the cleaning the hair seemed to break off and the dye seemed to come off more and more." After defendant had several times attempted to remedy the defect in the coat, it was again returned to appellant, when as plaintiff testifies the president of the company told her that he would send the coat on to New York and refund the purchase price which had in the meantime been paid. Later the defendant offered to make plaintiff a new coat, but she refused the offer.

Plaintiff's testimony upon important points is

The coat itself was completed by the latter part of December. Plaintiff tried it on at defendant's store and two slight alterations were made. The next morning she called for the coat, but did not try it on. A lady employee, however, put the coat on and plaintiff looked at it. It was then carried by defendant's salesman to plaintiff's automobile and she took it away.

The coat was first worn on New Year's eve and on the following day plaintiff observed that the car in which she had been riding was "just littered with dye, black all over." In the afternoon she looked at her evening dress and alipers which she wore the night before and "they were as black as they could be, littered with black all over, the evening dress, the alipers and everything just littered, the bed where I laid them on, the bedspread was as black - well, it has been boiled and washed and we never got it out."

Complaint was made to the defendant and at its request the coat was returned. It was sent to plaintiff again, but as she testified, "seemed to get worse with the dyeing. The hair and everything seemed to come off worse than before. With the cleaning the hair seemed to break off and the dye seemed to come off more and more." After defendant had several times attempted to remedy the defect in the coat, it was again returned to appellant, when as plaintiff testified the president of the company told her that he would send the coat on to New York and return the purchase price which was in the meantime been paid. Later the defendant offered to make plaintiff a new coat, but she refused the offer.

Plaintiff's testimony upon important points is

corroborated by that of her two sisters and the chauffeur.

The evidence for the plaintiff conflicted with that offered for the defendant on several points. The president of the company Mr. Mahon and the salesman, Mr. Yost, both testify that when she first went to the store plaintiff asked for Rice's dye without suggestion on their part; that it appeared from her conversation that she knew all about it and its reputation and that she had an opportunity to and did examine the skins from which the coat was made and the coat itself before it was delivered. Mr. Mahon, the president, also denied that he promised to refund the purchase price, but on the contrary says that he told plaintiff he would do everything possible to obtain redress from the dealers who had sold him the skins and if successful in doing it, would gladly refund her money.

The testimony for defendant corroborates that of plaintiff in that it shows the coat was really defective and that its defects could not be remedied.

The pleadings are very indefinite, but their sufficiency has not been questioned, nor is error claimed as to the admission of evidence. Propositions of law were not submitted to the court by either party. At the time of the transaction the Uniform Sales Law (Hurd's Revised Statutes, Chap. 121-a, page 2315) was in force and the provisions of that statute would apply to the transaction, but with the record in the condition it is, we are unable to determine what rule or rules of law the trial court applied to the facts before it.

We doubt the sufficiency of the evidence to sustain a finding of express warranty, but think that the court might have been justified in finding an implied warranty that the

corroborated by that of her two sisters and the chauffeur. The evidence for the plaintiff conflicted with that offered for the defendant on several points. The president of the company, Mr. Wilson and the salesman, Mr. Yeat, both testify that when she first went to the store plaintiff asked for Alice's dye without suggestion on their part; that it appeared from her conversation that she knew all about it and its reputation and that she had an opportunity to and did examine the skin from which the coat was made and the coat itself before it was delivered. Mr. Wilson, the president, also denied that he promised to return the purchase price, but on the contrary says that he told plaintiff he would do everything possible to obtain redress from the dealer who had sold him the skin and if successful in doing it, would gladly refund her money. The testimony for defendant corroborated that of plaintiff in that it shows the coat was really defective and that its defect could not be remedied. The pleadings are very indefinite, but their sufficiency has not been questioned, nor is error claimed as to the admission of evidence. Propositions of law were not submitted to the court by either party. At the time of the transaction the Uniform Sales Law (Hurd's Revised Statutes, Chap. 131-a, page 2315) was in force and the provisions of that statute would apply to the transaction, but with the record in the condition it is, we are unable to determine what rule or rules of law the trial court applied to the facts before it. We doubt the sufficiency of the evidence to sustain a finding of express warranty, but think that the court might have been justified in finding an implied warranty that the

coat should be reasonably fit for the purpose for which it was bought.

Defendant claims there is proof of an examination by plaintiff prior to the delivery of the coat which ought to have revealed its defects to her. The evidence was in conflict on this point and if the court found in favor of the plaintiff thereon, we cannot say the finding was clearly against the weight of the evidence. If it be urged that the plaintiff should have discovered the defect in the dyes upon the slight examination which she made of the garment and the goods, much more we think would it be true that the defendant, an expert in the business who not only had an opportunity to examine the skins prior to the purchase of the same, but also during the manufacture of the coat from the skins, should have ascertained such defect.

If it be conceded as appellant urges that the sale was one of a specified article under its patent or other trade name and that there would, therefore, be no implied warranty as to the fitness of the article for any particular purpose, it would, nevertheless, be true that the defendant would be liable if it should be made to appear that it was negligent in its selection of the articles delivered. That such negligence on the part of defendant existed is, we think, abundantly proved. However, questions of law are not preserved by the record, (Mutual Protective League v. McKee, 223 Ill. 364) and upon a consideration of all the evidence, we cannot say that the findings of the court are clearly and manifestly against its weight.

The judgment will therefore be affirmed.

AFFIRMED.

cost should be reasonably fit for the purpose for which it was bought.

Defendant claims there is proof of an examination by plaintiff prior to the delivery of the coat which ought to have revealed its defects to her. The evidence was in conflict on this point and if the court found in favor of the plaintiff thereon, we cannot say the finding was clearly against the weight of the evidence. It is urged that the plaintiff should have discovered the defect in the fur upon the slight examination which was made of the garment and the goods, much more we think would it be true that the defendant, an expert in the business who not only had an opportunity to examine the skins prior to the purchase of the same, but also during the manufacture of the coat from the skins, should have ascertained such defect.

If it be conceded as appellant urges that the coat was one of a specified article under its patent or other trade name and that there would, in fact, be no implied warranty as to the fitness of the article for any particular purpose, it would, nevertheless, be true that the defendant would be liable if it should be made to appear that it was negligent in its selection of the article delivered. That such negligence on the part of defendant existed is, we think, abundantly proved. However, questions of law are not preserved by the record. (Central Protective League v. Hotel, 224 Ill. 384) and upon a consideration of all the evidence, we cannot say that the findings of the court are clearly and manifestly against the weight. The judgment will therefore be affirmed.

JAMES F. BISHOP, Administrator
of the estate of JOHN KARAS,
deceased,

Appellee,

vs.

INTERNATIONAL HARVESTER COMPANY
OF NEW JERSEY, a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 298

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered by the Municipal Court of Chicago in favor of James F. Bishop, as administrator of the estate of John Karas, deceased.

The evidence showed that plaintiff's intestate, John Karas, on October 22nd, 1912, while employed by appellant, became a member of the defendant's Employees' Benefit Association. Plaintiff sued to recover death benefits claimed to be due under the certificate of membership.

The application of deceased provided, that unless otherwise designated, these benefits should be payable to his wife if living; if not, then to his children, "or, if there be no children nor children's children living, then to _____, if living, and if not living to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representative, * * * *".

At the time plaintiff's intestate died on the 28th day of June, 1915, he was unmarried and left no children nor descendants of children surviving him, but did leave him

JAMES F. BISHOP, Administrator
of the estate of JAMES KAHAN,
deceased,
Appellee,

vs.

THE NATIONAL HARBOR TRUST COMPANY,
BY JAMES F. BISHOP, a corporation,
Appellant.

APPEAL FROM
JUDICIAL COUNCIL
OF CHICAGO.

311 I.A. 308

THE JUSTICE DEPARTMENT DIVISION THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered by the Judicial Court of Chicago in favor of James F. Bishop, an administrator of the estate of James Kahan, deceased.

The evidence shows that plaintiff's intestate, John Kahan, on October 2nd, 1912, while employed by appellant, became a member of the defendant's "Employees' Benefit Association." Plaintiff sued to recover death benefits claimed to be due under the certificate of membership.

The condition of deceased provided, that unless otherwise designated, these benefits should be payable to his wife if living; if not, then to his children; or, if there be no children nor plaintiff's children living, then to _____, if living, and if not living to his father and mother jointly, or the survivor; or, if neither be living, then to any next of kin, payment in behalf of such next of kin to be made to my legal representative, * * *. At the time plaintiff's intestate died on the 25th day of June, 1912, he was unmarried and left no children nor

surviving, Jacob Karas and Mary Karas, his father and mother respectively.

While no evidence appears in the record upon the subject, it seems to have been conceded that the father and mother of the deceased were residing in Europe, somewhere in Galicia, within the territory in which the great war has been waged and that they had not been heard from since the beginning of the war. Their daughter, a sister of the deceased, does not know whether they are living or dead.

Appellant upon the trial insisted that the administrator had no right to sue on the policy and has by proper objections and motions preserved the question in the record. The plain language of the instrument sued on indicates that the position of appellant must be sustained.

There being no proof in the record from which the death of the parents can either be found as a fact, or presumed, the right of action is in them or the survivor of them, not the administrator. People v. Petrie, 191 Ill. 497.

For the reason indicated, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

surviving, Jacob Baras and Mary Baras, his father and mother respectively.

While no evidence appears in the record upon the subject, it seems to have been conceded that the father and mother of the deceased were residing in Europe, somewhere in Russia, within the territory in which the Greek war has been waged and that they had not been heard from since the beginning of the war. Their daughter, a sister of the deceased, does not know whether they are living or dead.

Appellant upon the trial insisted that the administrator had no right to sue on the policy and was by proper objections and motions preserved the question in the record. The plain language of the instrument and an indication that the position of appellant must be sustained.

There being no proof in the record from which the death of the parents can either be found as a fact, or presumed, the right of action is in favor of the survivor of them, not the administrator. Legg v. Legg, 171 Ill. 437. For the reason indicated, the judgment must be

reversed and the cause remanded.

Reversed and remanded.

YELLOW CAB COMPANY,
a corporation,
Appellee,

vs.

JOHN G. CARLSEN,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MARCHET DELIVERED THE OPINION OF THE COURT.

Plaintiff below, appellee here, sued for damages sustained by reason of a collision between an automobile owned by it and one driven by appellant.

The collision occurred on Michigan Boulevard in the city of Chicago, a street which extends north and south, while the car owned by the plaintiff was proceeding north on the east side of the Boulevard and appellant was coming south on the same side of the Boulevard at a speed of about twenty miles per hour. In driving at that rate, as well as in travelling on the wrong side of the street, no room is left to doubt that the negligence alleged was established. It is urged that plaintiff was guilty of contributory negligence. It was necessary for the plaintiff to prove that he was at the time of the accident in the exercise of due care.

The cause was tried by the court without a jury and the finding of the trial court on the question of contributory negligence is entitled to the same weight on this appeal as the verdict of a jury.

We think the evidence justified the finding of the court on this question as well as the other controverted facts in regard to the damages which plaintiff sustained. We cannot say that the findings of the court are against the weight of the evidence and the judgment will therefore be affirmed.

AFFIRMED.

211.1.338

PLAINTIFF'S EXHIBIT
 DEFENDANT'S EXHIBIT
 JURY
 COURT
 JUDGE
 CLERK
 SHERIFF
 DEPUTY SHERIFF
 JAILER
 WARDEN
 CHIEF OF POLICE
 DEPUTY CHIEF OF POLICE
 INSPECTOR
 DETECTIVE
 SERGEANT
 PATROLMAN
 TRAFFIC OFFICER
 RECORDS SECTION
 COMMUNICATIONS SECTION
 IDENTIFICATION SECTION
 LABORATORY
 MEDICAL EXAMINER
 CORONER
 JURY ROOM
 COURTROOM
 JUDGE'S CHAMBERS
 CLERK'S OFFICE
 SHERIFF'S OFFICE
 JAIL
 WARDEN'S OFFICE
 CHIEF OF POLICE'S OFFICE
 DETECTIVE'S OFFICE
 SERGEANT'S OFFICE
 PATROLMAN'S OFFICE
 TRAFFIC OFFICER'S OFFICE
 RECORDS SECTION
 COMMUNICATIONS SECTION
 IDENTIFICATION SECTION
 LABORATORY
 MEDICAL EXAMINER
 CORONER

Plaintiff below, appellee here, and her husband sustained by reason of a collision between an automobile owned by it and one driven by appellant.

The collision occurred on Michigan Boulevard in the city of Chicago, a street which extends north and south, while the car owned by the plaintiff was proceeding south on the east side of the boulevard and appellant was coming south on the same side of the Boulevard at a point of about twenty

miles per hour. In driving at that rate, as well as in traveling on the wrong side of the street, no room is left to doubt that the negligence alleged was established. It is urged that plaintiff was guilty of contributory negligence. It was necessary for the plaintiff to prove that he was at the time of the accident in the exercise of due care.

The cause was tried by the court without a jury and the finding of the trial court on the question of contributory negligence is entitled to the same weight on this appeal as the verdict of a jury.

We think the evidence justified the finding of the court on this question as well as the other controverted facts in regard to the damages which plaintiff sustained. We cannot say that the findings of the court are against the weight of the evidence and the judgment will therefore be

171 - 23514

MADISON MAGINN,
Appellee,

vs.

JOSEPH LEVY,
Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

211 I.A. 300

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case plaintiff brought suit upon a written contract with the defendant in which it was claimed plaintiff agreed to provide a set of plans for a ventilating system and equip certain premises owned by defendant therewith, for a consideration named in the contract.

The cause was submitted to a jury. After the trial began the defendant by leave of court filed a duly verified plea of non est factum, in which the execution of the contract sued upon was denied. This cast upon the plaintiff the burden of proving its due execution as at common law. Zuel v. Bowen, 78 Ill. 234; Woolverton v. Sumner, 53 Ill. App. 115.

Plaintiff testified that he saw the defendant sign the contract; that they were in defendant's store between 30th and 31st Streets on State at the time; that it was the only contract defendant signed as far as he could remember. The supposed contract was then received in evidence as plaintiff's exhibit one.

Defendant was shown his purported signature upon the document put in evidence and emphatically denied that it was his signature. On cross examination at the request of counsel for plaintiff, a contract was produced by the attorney for defendant, which defendant stated was the contract which he had in fact signed. This contract was offered in

MAURICE M. MANN, Appellee,

vs.

JOSEPH LEVY, Appellant.

Appellee,

Appellant.

CHERRY STREET

CHERRY STREET

CHERRY STREET

211 I.A. 300

MR. JUSTICE MANNETT DELIVERED THE OPINION OF THE COURT.

In this case plaintiff brought suit upon a written contract with the defendant in which it was claimed plaintiff agreed to provide a set of plans for a ventilating system and equip certain premises owned by defendant therewith, for a consideration named in the contract.

The cause was submitted to a jury. After the trial began the defendant by leave of court filed a duly verified plea of non est factum, in which the execution of the contract was denied. It was held upon the plaintiff the burden of proving its due execution as at common law. Evel v. Bowen, 78 Ill. 234; Reed v. Reed, 23 Ill. App. 111.

Plaintiff testified that he saw the defendant sign the contract; that they were in defendant's store between 50th and 51st Streets on State St. at the time; that it was the only contract defendant signed as far as he could remember. The supposed contract was then received in evidence as plaintiff's exhibit one.

Defendant was shown his purported signature upon the document put in evidence and emphatically denied that it was his signature. On cross examination at the request of counsel for plaintiff, a contract was produced by the attorney for defendant, which defendant stated was the contract which he had in fact signed. This contract was offered in

evidence by plaintiff, but upon objection by defendant that there was a variance between it and the contract declared on, the court excluded it.

Another witness who was familiar with the signature of the defendant also testified that the purported signature on plaintiff's exhibit one was not the defendant's true signature.

There was put in evidence as defendant's exhibit 3, a notice from defendant to the plaintiff dated September 25th, 1913, which was signed by the defendant and according to all the evidence his genuine signature appears thereon. Plaintiff's exhibit 1 and defendant's exhibit 3 (originals) on motion of appellant have been filed in this court for our inspection.

The spacing, slanting and other characteristics of the letters appearing in the genuine signature are so different from the signature which appears upon plaintiff's exhibit 1, that we must hold the purported signature on said plaintiff's exhibit 1 is not the genuine signature of defendant.

In this condition of the record the plea having cast the burden of proof upon the plaintiff, we think the verdict of the jury should have been set aside and a new trial granted. Lincoln v. Stowell, 62 Ill. 84; Peaslee v. Glass, 61 Ill. 94.

We do not agree with the contention of appellant that the signature on plaintiff's exhibit 1 is necessarily a forgery.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

evidence by plaintiff, but upon objection by defendant that there was a variance between it and the contract declared on, the court excluded it.

Another witness who was familiar with the signature of the defendant also testified that the purported signature on plaintiff's exhibit one was not the defendant's true signature.

There was put in evidence as defendant's exhibit 3, a notice from defendant to the plaintiff dated September 25th, 1913, which was signed by the defendant and according to all the evidence his genuine signature appears thereon. Plaintiff's exhibit 1 and defendant's exhibit 3 (originals) on motion of appellant have been filed in this court for our inspection.

The spacing, slanting and other characteristics of the letters appearing in the genuine signature are so different from the signature which appears upon plaintiff's exhibit 1, that we must hold the purported signature on said plaintiff's exhibit 1 is not the genuine signature of defendant.

In this condition of the record the plea having cast the burden of proof upon the plaintiff, we think the verdict of the jury should have been set aside and a new trial granted. Lincoln v. Howell, 62 Ill. 64; Farabee v. Glass, 61 Ill. 94.

We do not agree with the contention of appellant that the signature on plaintiff's exhibit 1 is necessarily a forgery.

The judgment must be reversed and the cause remanded.

REVEREND AND HONORABLE.

190 - 23533

211 I.A. 301

WILLIAM O. HOLMBERG,
Appellee,

vs.

GENERAL ELECTRIC COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant here was the garnishee below in a proceeding whereby it was sought to recover for the use of W. O. Holmberg, a judgment creditor of one Charles P. Murchison.

A garnishee summons was served on appellant on the 13th day of April, 1917. The garnishee answered April 24th, 1917, stating that it had no property in its hands or control belonging to the debtor at the time of the service of the writ, nor at the time of the filing of the answer.

Interrogatories were filed by the judgment creditor in reply to which appellant stated that payments of \$75.00 each had been made by the garnishee to Murchison the judgment debtor on April 16th and April 28th, 1917, for services to be thereafter rendered.

The district auditor of appellant called by appellee further testified that further payments of \$75.00 each had been made to the judgment debtor on May 4th, 1917 and May 30th, 1917, respectively. He also testified that these payments would not have been made unless he had felt sure that Murchison was ready, willing and able to perform the services for which he was paid and that he had subsequently performed such ser-

10311.A.301

100 - 25553

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

WILLIAM O. SCHLIMBERG,
Appellee,
vs.
GENERAL ELECTRIC COMPANY,
a corporation,
Appellant.

THE JUDICIAL DEPARTMENT DELIVERED THE OPINION OF THE COURT.

Appellant here was the plaintiff below in a proceeding whereby it was sought to recover for the use of
F. O. Schlimberg, a judgment creditor of one Charles F.
Murchison.

A complaint was served on appellant on the
13th day of April, 1917. The complaint answered April 25th,
1917, stating that it had no property in its hands or con-
trol belonging to the debtor at the time of the service of
the writ, nor at the time of the filing of the answer.

Interrogatories were filed by the judgment creditor
in reply to which appellant stated that payments of \$5.00
each had been made by the complainant to Murchison the judgment
debtor on April 15th and April 25th, 1917, for services to be
thereafter rendered.

The district auditor of appellant called by appellee
further testified that further payments of \$5.00 each had been
made to the judgment debtor on May 4th, 1917 and May 20th,
1917, respectively. He also testified that these payments
would not have been made unless he had felt sure that Murchison
was ready, willing and able to perform the services for which
he was paid and that he had subsequently performed such ser-

vices and was still in the employ of the company. Appellant moved that it be discharged as garnishee and the court overruled the motion.

Appellant then introduced evidence to the effect that the judgment debtor had been in its employ prior to 1911; that in that year he was transferred to Goshen, Indiana. At the same time an agreement was made with him whereby his salary was to be paid semi-monthly in advance. The receipts for payments which had been made to the judgment debtor on account of his salary were put in evidence and proved such advance payments. Upon this evidence the court found the issues for the plaintiff and entered judgment against the garnishee for \$189.60. We think the court erred.

The case of C. & E. I. R. R. Co. v. Elagden, 33 Ill. App. 254, decides the identical question here raised. For the reasons stated in the opinion rendered in that case the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

view and was still in the employ of the company. Applicant
never tried to be discharged as Garman and the court over-
ruled the motion.

Applicant then introduced evidence to the effect
that the instant action had been in the order prior to
1911; that in that year he was transferred to Goshen, Indiana.
At the same time an agreement was made with his employer his
salary was to be paid semi-monthly in advance. The receipt
for payment which had been made to the defendant's order on
account of his salary were put in evidence and proved same
advance payments. Upon this evidence the court found the
issues for the plaintiff and entered judgment against the
defendant for \$180.00. We take the court over.

The case of E. A. L. v. L. A. Co. v. Ridenour, 53 Ill.
App. 204, decided the identical question here raised. For
the reasons stated in the opinion rendered in that case the
judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

210 - 23554

CLINTON O. SHEPHERD,
Trustee,

Appellant,

vs.

ABRAHAM L. WEBER,

Appellee.

Error to

~~APPEAL FROM~~

CIRCUIT COURT,

COOK COUNTY.

211 I.A. 302

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, who was complainant below, seeks to reverse a decree of the Circuit Court of Cook County.

Complainant had acquired a leasehold and building at 105-9 North Dearborn Street in Chicago, subject to existing leases, one of which was to the defendants Weber and Gallion, demising for a rental of \$11,700 suites 1203-4-5-6 in said building for a period of five years. The rentals were payable in installments of \$195.00 in advance on the first day of each and every month. The defendants entered into possession of the demised premises May 1st, 1914, and were in possession of the same at the time the bill of complaint was filed.

The lease gave to the lessees the privilege of subletting. The rent was paid up to January 1st, 1915. On May 20th, 1915, complainant caused a judgment in his favor and against the defendants to be entered in the Municipal Court of Chicago under the power to confess judgment contained in the lease for the sum of \$605.00.

The bailiff having failed to collect by execution, complainant filed his bill setting up the judgment and its inability to collect the same, alleging that the defendants were collecting rentals from the sub-tenants; that the

CLINTON C. WATSON,
Plaintiff,

vs.

vs.

ANNE M. WATSON,
Defendant.

Circuit Court,

Deer County.

2111A.308

MR. JUSTICE WATSON delivered the opinion of the court.

Appellant, the now complainant below, seeks to

reverse a decree of the Circuit Court of Deer County.

Complainant was assigned a household and residing

at 103-3 North Main Street in Chicago, subject to exist-

ing lease, one of which was to the defendant below and

William, defendant, for a period of \$1,100 a year 1915-16-17

in said building for a period of five years. The complaint

was payable in installments of \$100.00 in advance on the

first day of each and every month. The defendants entered

into possession of the leased premises May 1st, 1915, and

were in possession of the same at the time the bill of

complaint was filed.

The lease gave to the lessee the privilege of sub-

letting. The rent was paid up to January 1st, 1916. On May

20th, 1916, complainant caused a judgment in his favor and

against the defendants to be entered in the Municipal Court

of Chicago under his power to confer judgment contained in

the lease for the sum of \$600.00.

The bill of complaint failed to collect by execution.

Complainant filed his bill setting up the judgment and its

inability to collect the same, alleging that the defendants

were collecting rents from the defendants; that the

defendants were financially irresponsible and prayed for an accounting, an injunction and a receiver. Gallion made default and Weber answered admitting the execution of the lease as alleged, and that the defendants had entered into possession and were still in possession of the premises and collecting the rents from the sub-tenants; that judgment had been obtained and was unsatisfied, but denied that he was insolvent.

By an amended cross bill filed January 21st, 1917, defendant Weber set up that the lease in question had been executed upon the promise of the lessor to name the building the Sentinel Building unless tenants on the second floor thereof should propose a different name, which agreement had not been kept; that the lessor had agreed to furnish necessary janitor service and maintain the building as a first class office building which he had not done and that by reason thereof, the rental value of the premises had been reduced to not more than \$100.00 per month. The cross bill prayed for an accounting, for cancellation of the lease and for an injunction restraining the collection of the judgment, and also the assessment of damages of \$25,000, by reason of the failure or refusal to name the building.

The answer of complainant to the cross bill denied liability as to these several matters and the rights of the cross complainant to the relief asked for.

The decree correctly, we think, found against the cross complainant as to the issue of the naming of the building, but found that the cross complainant had a right to have the lease cancelled because of insufficiency of janitor and elevator service, and ordered an accounting to be taken between the parties, in the meantime enjoining the collection

defendants were financially irresponsible and proved to be uncollectible, an assignment was a necessity. Called upon to do

plaintiff and debtor answered admitting the assignment of the house as alleged, and that the defendants had entered into possession and were still in possession of the premises and collecting the rents from the sub-tenant; that defendant had been obtained and was uncollectible, but denied that he was insolvent.

By an amended cross bill filed January 21st, 1917,

defendant asked set up that the lease in question had been executed upon the promise of the tenant to keep the building the best maintained building unless tenants at the second floor thereat should propose a different name, which agreement had not been kept; that the tenant had agreed to furnish

necessary janitor service and maintain the building as a first class office building with no and not less and that by reason thereof, the rental value of the premises had been reduced to not more than \$100.00 per month. The cross bill prayed for an accounting, for cancellation of the lease and for an injunction restraining the collection of the judgment, and also the assessment of damages of \$25,000, by reason of the failure or refusal to name the building.

The answer of complaint to the cross bill denied liability as to these several matters and the right of the cross complainant to the relief asked for.

The decree correctly, we think, found against the cross complainant as to the issue of the naming of the building, but found that the cross complainant had a right to have the lease cancelled because of insufficiency of janitor and elevator service, and decreed an accounting to be taken

of the judgment.

The evidence with regard to the janitor and elevator service furnished has been examined by us with care. It consisted of the evidence of cross complainant and that of his manager of the business in which they were engaged. Their evidence was that the windows were left unwashed; that the wash bowls were continuously dirty; that instead of the three elevators being run continuously, most of the time only two were running, and that the boys would stay out in the lobby gossiping with the girl there, and sometimes would have to wait three or four minutes for the elevator to run back.

Evidence for the cross defendant was to the effect that the janitor and elevator service were first class in every respect; that the elevators ran according to schedule and that competent men were in charge of them. It appears that only at one time was a complaint made in regard to the janitor and elevator service and that was with reference to some dirt which it was claimed had accumulated about a couch. It devolved upon cross complainant to sustain the allegations of his cross bill by a preponderance of the evidence.

It is very difficult to believe that if the janitor and elevator service had been as insufficient as claimed, that only one complaint with reference thereto would have been made. Moreover, it appears that on May 15th, 1915, cross complainant wrote a letter to the agents of the building asking to be released from their lease, he stating as the sole and only reason therefor that the building had not been named and that he was unable to get sub-tenants. In that letter he said, "As a legal proposition, we feel that,

of the judgment.

The evidence with regard to the latter was

elevator service furnished has been examined by us with care.

It consisted of the evidence of cross-examination and that of

his manner of the business in which they were engaged. Their

evidence was that the windows were left uncleaned; that the

wash bowls were continuously dirty; that instead of the

three elevators being run continuously, most of the time

only two were running, and that the boys were busy out

in the lobby standing with the girls there, and sometimes

would have to wait three or four minutes for the elevator

to run back.

Evidence for the cross defendant was to the effect

that the janitor and elevator service were hired about in

every respect; that the elevator was according to schedule

and that complaint was made in time of time. It appears

that only at one time was complaint made in regard to the

janitor and elevator service and that was with reference to

some dirt which he was claimed had accumulated about a couch.

It appears upon cross-examination to be within the knowledge

of his cross that by a recommendation of the witnesses.

It is very difficult to believe that if the janitor

and elevator service had been as inefficient as claimed,

that only one complaint with reference thereto would have

been made. Moreover, it appears that on May 1st, 1911, cross

complaints were a letter to the heads of the building

saying to be released from their duties, he stating at the

same and only reason thereby that the building had not

been cleaned and that he was unable to get satisfactorily. In

that letter he said, "As a legal professional, we feel that,

since the building was not named on the first of May last year, and since the promise was made to us by Mr. Cleary that the name of the building should be changed by the first of May, 1914, that the lease was not complied with by the owners and that we are warranted to have the lease cancelled." In this letter not a word of complaint appears as to janitor and elevator service. We are satisfied that the claim in that regard was an after thought and is not the real reason why cross complainant seeks to have the lease cancelled. But if we would assume that all of the evidence offered by cross complainant on this subject was uncontradicted, it would in our opinion not be sufficient to establish a constructive eviction, nor give appellee the right to cancel the lease. Barrett v. Brodie, 158 Ill. 479; Risser v. O'Connell, 172 Ill. App. 64; Delmar Investment Co. v. Blumenfield, 118 Mo. App. 308.

The decree was erroneous and it will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

which the building was not used on the first of May last year, and since the premises were taken to us by Mr. O'Leary that the name of the building should be changed by the first of May, 1911, that the name was not changed with the company and that we were requested to have the name changed. In this letter was a word of complaint against us to justify our action. We were satisfied that the claim in that regard was an after thought and in now the real reason why cross complaint needs to have the name changed. But if we would assume that all of the evidence offered by cross complaint on this subject was uncontradicted, it would in our opinion not be sufficient to establish a constructive eviction, nor give appellee the right to remove the lease. Harrett v. Rogers, 128 Ill. 117; Harrett v. O'Connell, 174 Ill. App. 64; Salmon Investment Co. v. Thompson, 118 Ill. App. 308.

The cross complaint was overruled and it will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

203 - 23564

EDWARD A. CIVILINSKI, a minor,
by Julia Civilinski, his next
friend,

Appellee,

vs.

S. MASON MEEK,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 303

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, sued by his next friend, and in his statement of claim alleged that he lived with his parents who were tenants of defendant in an apartment appurtenant to which was a front "stoop" extending from the sidewalk in front of the premises to the first floor thereof; that on each side of said stairway or "stoop" was a handrail; that the stairway was used as an entrance and exit way by the different tenants who lived in the building; that the defendant had control of the stairway and handrail, and that it was his duty to keep them reasonably safe which he did not do, by means whereof the plaintiff while in the exercise of due care was injured etc.

The affidavit of merits denied the premises were out of repair; alleged that the accident was due to plaintiff's fault; that the railing was wantonly and maliciously loosened by someone to the defendant unknown of which plaintiff had notice, but of which defendant had no knowledge; that the premises had been put in good repair a short time before the accident and that it was the duty of the tenants to notify the defendant of any want of repair, but that plaintiff did not do so.

LEONARD A. CIVILIAN, a minor,
by Julia Javitski, his next
friend,

Appellee,

vs.

E. MACON BROS.,
Appellant.

WESTERN
NATIONAL COURT
ON CHICAGO.

8111A-808

THE JUSTICE DEPARTMENT DIVISION OF THE COURT.

Plaintiff, a minor, sued by his next friend, and
 in his statement of claim alleged that he lived with his
 parents were tenants of defendant in an apartment
 apartment to which was a front "stair" extending from
 the stairs in front of the premises to the first floor
 thereof; that on each side of said stairway or "stair"
 was a handrail; that the stairway was used as an entrance
 and exit way by the different tenants who lived in the
 building; that the defendant had control of the stairway
 and handrail, and that it was his duty to keep them reason-
 ably safe which he did not do, by means whereof the plain-
 tiff while in the exercise of due care was injured etc.
 The affidavit of Justice denied the premises were
 out of repair; alleged that the accident was due to plain-
 tiff's fault; that the railing was wantonly and maliciously
 loosened by someone to the defendant unknown of which
 plaintiff had notice, but of which defendant had no knowledge;
 that the premises had been put in good repair shortly
 before the accident and that it was the duty of the tenants
 to notify the defendant of any want of repair, but that
 plaintiff did not do so.

The case was submitted to a jury upon instructions to which defendant, appellant here, neither made objection nor took exception, and therefore, cannot be complained of. Scott v. Chicago Binder & File Co., 170 Ill. App. 391.

The issues as to defendant's negligence, plaintiff's contributory negligence, notice and the amount of plaintiff's damages (on all of which points the evidence was conflicting) were submitted to the jury under these instructions and the verdict against defendant was approved by the trial court. We see no reason why the judgment should be disturbed on any of these grounds.

Appellant further complains of a variance in that the statement of claim alleged the north handrail to be defective, while the proof showed it was the south handrail. At the time the evidence was offered, the defendant did not object, nor did he prior to the submission of the case to the jury, make any motion to exclude it. This was necessary in order to preserve this question for review. Carney v. Marquette Coal Mining Co., 260 Ill. 225.

Appellant also complains that the court received incompetent testimony in permitting an expert of the plaintiff to testify without showing proper qualifications. No objections to the specific questions when asked, nor motion to strike the evidence complained of appears in the record and for that reason the point is not reviewable here.

Appellant argues that the evidence failed to show that the stairway of which the handrail was a part was under the control of the defendant landlord at the time of the injury. Plaintiff's statement of claim alleged that it was, and defendant's affidavit of merits did not deny that such was the fact. There was uncontradicted evidence from which

The case was submitted to a jury under instructions to which defendant, appellant here, neither made objection nor took exception, and therefore, cannot be complained of.

Scott v. Chicago Binder & Wire Co., 170 Ill. App. 301.

The issue as to defendant's negligence, plaintiff's contributory negligence, notice and the amount of plaintiff's damages (on all of which points the evidence was conflicting) were submitted to the jury under these instructions and the verdict against defendant was approved by the trial court.

We see no reason why the judgment should be disturbed on any of these grounds.

Appellant further complains of a variance in that the statement of claim alleged the north haul to be defective, while the proof showed it was the north haul itself. At the time the evidence was offered, the defendant did not object, nor did he prior to the submission of the case to the jury, make any motion to exclude it. This was necessary in order to preserve this question for review. Quincy v. Harpster Coal Mining Co., 200 Ill. 215.

Appellant also complains that the court received incompetent testimony in permitting an expert of the plain-tiff to testify without showing proper qualifications. No objections to the expert's questions were asked, nor motion to strike the evidence complained of appears in the record and for that reason the point is not reversible here.

Appellant argues that the evidence failed to show that the railway of which the hauler was a part was under the control of the defendant landlord at the time of the injury. Plaintiff's statement of claim alleged that it was and defendant's affidavit of merits did not deny that such was the fact. There was uncontradicted evidence from which

the jury could reasonably find this to be so.

The judgment which is for \$350.00 is not excessive and it will be affirmed.

AFFIRMED.

the jury could reasonably find this to be so.

The judgment which is for \$250.00 is not excessive

and it will be affirmed.

AFFIRMED.

211/304

316 - 23661

Filed May 14, 1918

LAWRENCE MENTION,
Appellee,

vs.

E. J. CHREINSTEIN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 304

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On the motion of appellee the stenographic report of the evidence taken in the trial court has heretofore been stricken and a motion of appellant to set aside the said order has been reserved to the hearing.

The judgment from which the appeal was taken was entered in the Municipal Court of Chicago on June 7th, 1917, and the trial judge then entered an order extending the time in which a stenographic report or bill of exceptions might be presented to ninety days from that date. This time expired September 7th, 1917.

The stenographic report was not filed with the clerk until September 31st, 1917, and it was signed by the trial judge on the same date nunc pro tunc as of September 7th, 1917. There appears upon it this endorsement:

"I hereby certify that the foregoing document in the absence from Chicago of Judge Wells, was presented to me in open court to be signed this 7th day of September, 1917.

Harry Olson,
Judge of the Municipal Court
of Chicago."

It is argued by appellant that the endorsement of Judge Olson on September 7th furnishes a sufficient basis for the entry of the nunc pro tunc order of the trial judge, Judge Wells, on September 25th. We do not think so in the absence of an affirmative showing of due

diligence on the part of appellant by the certificate of the trial judge. This^{is} the rule laid down in People v. Rosenthal, 266 Ill. 548, and following that rule we must now deny the motion to set aside the order striking this stenographic report or bill of exceptions.

As the common law record appears to be without error, the judgment of the trial court must be affirmed.

AFFIRMED.

275 - 23620

PERRY M. CALDWELL,
doing business as Sixty-
Third and Halsted Garage,

Appellant

vs.

CHICAGO CITY RAILWAY COMPANY,
a corporation,

Appellee

Appeal from

Municipal Court

of Chicago

211 I.A. 310

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellant brought suit for damages owing to injury to one of its automobiles alleged to have been caused by the negligence of the appellee in the operation of a street car. The case was tried without a jury and at the close of the evidence judgment was entered in favor of the appellee against the appellant, for costs.

On Sunday, April 4, 1915, at about 8:30 a.m. one Moss hired a taxicab (a Stevens-Duryea car) of appellant to take his mother to a certain railroad station. The car was driven by one Hamilton, an employee of the appellant. It was a rainy day and the streets were wet. The automobile proceeded north on the east side of Wabash avenue going towards 26th street. As it neared 26th street, a street car belonging to the appellee came from the east going west on the latter street. The automobile and the street car collided near or just west of the center of the intersection of the two streets. As a result of the concussion, the street car left the tracks and came to a stop a little west of the west curb, being more on 26th street than on Wabash avenue. The automobile came to a stop

PERRY M. GARDNER,
doing business as Perry-
Smith and Halsted Garage.

Appellant

vs.

CHICAGO CITY & TRAY COMPANY,
a corporation,

Appellee

Appeal from

Municipal Court
of Chicago

311 I.A. 310

MR. HAMBING JUSTICE TAYLOR delivered the opinion of the
court.

Appellant brought suit for damages owing to

injury to one of its automobiles alleged to have been
caused by the negligence of the appellee in the operation
of a street car. The case was tried without a jury and
at the close of the evidence judgment was entered in favor
of the appellee against the appellant, for costs.

On Sunday, April 4, 1915, at about 8:30 a.m.

one More hired a taxicab (a Stevens-Duryer car) of appel-
ant to take his mother to a certain railroad station. The
car was driven by one Hamilton, an employee of the appel-
ant. It was a rainy day and the streets were wet. The
automobile proceeded north on the east side of Wabash Avenue
going towards 30th street. As it reached 30th street, a
street car belonging to the appellee came from the east
going west on the latter street. The automobile and the
street car collided near or just west of the center of the
intersection of the two streets. As a result of the col-
lision, the street car left the tracks and came to a stop
a little west of the west curb, being more on 30th street
than on Wabash Avenue. The automobile came to a stop

when against or near the curb at the southwest corner of 26th street and Wabash avenue. It was almost completely destroyed and was evidently of little value after the collision. Prior to the injury it was worth from \$1000.00 to \$1100.00, but afterwards not more than \$70.00. There was no damage to the street car except the breaking of some glass. There is some conflict as to the speed at which the automobile and the street car were going about the time of and just prior to the collision. The witness Anna Moss said that the speed of the automobile just before reaching 26th street was from six to eight miles an hour and that the street car was running very fast. The witness Dr. Moss said that the automobile slowed down and was going about eight miles an hour and that the street car was traveling very fast. The witness Nimz testified that the automobile was going about six to seven miles an hour and that the street car was traveling about twenty miles an hour. The witness Dr. McLaughlin testified that the automobile was going fairly fast, about ten miles an hour; that the street car, between Michigan avenue and Wabash avenue, was running about eight miles an hour; that it slowed up at the east side of Wabash avenue. The witness Braico testified that the automobile was going over ten miles an hour. The motorman testified that he stopped the street car on the east side of Wabash avenue. The conductor in charge of the street car testified that the automobile was going twenty-five or thirty miles an hour; that the street car stopped on the east side of Wabash avenue and then traveled at about five miles an hour.

when against or near the curb of the southeast corner of
- seen west and about 100 feet. It was almost complete-
it destroyed and was evidently of little value after the
collision. Prior to the injury it was worth from \$1000.00
to \$1500.00, but afterwards not more than \$70.00. There
was no damage to the street or except the breaking of
some glass. There is some conflict as to the speed at
which the automobile and the street car were going about
the time of and just prior to the collision. The wit-
ness Mrs. Moss said that the speed of the automobile just
before reaching Sixth Street was from six to eight miles an
hour and that the street car was traveling very fast. The
witness Dr. Moss said that the automobile moved down and
was going about eight miles an hour and that the street
car was traveling very fast. The witness Mrs. Cassell
said that the automobile was going about six to seven miles an
hour and that the street car was traveling about twenty
miles an hour. The witness Dr. Richardson testified that
the automobile was going fairly fast, about ten miles an
hour; that the street car, between Eighth Avenue and
Ninth Avenue, was traveling about eight miles an hour; that
it slowed up at the east side of Ninth Avenue. The wit-
ness Dr. Price testified that the automobile was going over ten
miles an hour. The witness testified that he stopped the
street car on the east side of Ninth Avenue. The conductor
in charge of the street car testified that the automobile was
going twenty-five or thirty miles an hour; that the street
car stopped on the east side of Ninth Avenue and then travel-
ed at about five miles an hour.

There is also a conflict in the evidence as to the precise circumstances at the time of the collision. The witness Anna Moss testified that the street car struck the automobile on the right side back of the first wheel and that the automobile was thrown into the gutter on the left hand, and that the street car was thrown off the track. The witness Dr. Moss testified that the driver of the automobile applied the brakes but as the road was slippery, the automobile skidded and the driver undertook to turn it west; that the street car struck the automobile near the back wheel on the right hand side and that the automobile was thrown against the curb on the southwest corner of the street; that at the time of the collision the driver was trying to turn west to avoid a collision and get out of the way of the car; that the street car was thrown off the track.

The witness Nimz testified that the street car struck the automobile in the middle on the right side and the automobile was thrown up on the curb at the southwest corner and that the street car was sent off the track on the other side near to the curb. Dr. McLaughlin testified that the automobile was traveling north a little left of the center on Wabash avenue; that it struck the street car near the end of the forward wheels; that the street car went into the gutter on Wabash; that the automobile stopped a little west of the west curb stone in Wabash avenue; that the collision was "soft"; that there was no jar.

The witness Braico testified that the automobile struck the car about five feet from the front; that the collision occurred about fifty feet west of the center of the intersection of the streets; that first the right front wheel of the automobile struck the car and then the other wheel came in contact and the street car started to go off the track;

There is also a conflict in the evidence as to the two circumstances of the collision. The witness who testified that the street car struck the automobile on the right side of the latter and that the automobile was thrown into the gutter on the left hand, and that the street car was thrown off the track. The witness Dr. Jones testified that the driver of the automobile applied the brakes but no sound was made, the automobile skidded and the driver was thrown to the left; that the street car struck the automobile near the rear wheel on the right hand side and that the automobile was thrown against the curb on the southwest corner of the street. That at the time of the collision the driver was trying to turn west to avoid a collision and get out of the way of the car; that the street car was thrown off the track. The witness also testified that the street car struck the automobile in the middle on the right side and the automobile was thrown up on the curb of the southwest corner and that the street car was sent off the track on the other side next to the curb. Dr. Jones also testified that the automobile was traveling north a little left of the center on Madison Avenue; that it struck the street car near the end of the lower block; that the street car went into the gutter on the right; that the automobile skidded a little west of the west curb stone in Madison Avenue; that the collision was "soft"; that there was no jar. The witness also testified that the witness Dr. Jones the car about five feet from the front; that the collision occurred about fifty feet west of the center of the intersection of the streets; that first the right front wheel of the automobile struck the car and then the other wheel came in contact and the street car started to go off the track;

that it struck the street car about five feet from the front end; that the force of the automobile pushed the car off the tracks.

The motorman testified that the front end of the street car did not strike the front wheel of the automobile. The conductor of the street car testified that the automobile ran into the front end of the car and knocked the street car off the tracks.

It is the contention of the appellant that the judgment of the trial court should be reversed as contrary to the weight of the evidence. Evidently the trial judge found in favor of the appellee on the ground that the appellant had not proven his cause of action by a preponderance of the evidence. It is the contention of the appellee that "the physical situation together with the testimony of defendant's witnesses establishes that defendant was not negligent in operating the car at the time in question." Of course, the finding of the trial court without a jury, where the evidence is conflicting, will not be disturbed unless against the manifest weight of the evidence; and, in considering the weight of the evidence, this court necessarily, under the law, will consider the superior opportunity of the trial court in that it sees and hears the witnesses. Salbey v. Hayes, 267 Ill. 521; Nelson v. McKeown, 203 Ill. App. 231; Rosenbluth v. Heintz Food Co., Ill. App. 226.

The evidence of three witnesses, Dr. McLaughlin, the motorman and the conductor, that the street car either slowed up or stopped at the east side of Wabash avenue, together with the evidence that the street was wet and slippery,

and that the collision took place near the center, or west of the center, of the intersection of the two streets; and the evidence of Dr. Moss that the driver of the automobile applied

that it struck the witness car about five feet from the front end; and the force of the impact was such as to throw the witness car off its wheels.

The witness testified that at the time of the accident the witness car was on the right side of the street and was moving toward the left. The witness testified that the impact was made on the front end of the car and knocked the witness car off its wheels.

It is the contention of the witnesses that the judgment of the trial court should be reversed on account of the weight of the evidence. Evidently the trial judge found in favor of the appellee on the ground that the appellant had not proven his case by a preponderance of the evidence. It is the contention of the appellee that "the physical situation to which the witness is subjected by defendant's witnesses established that defendant was not negligent in operating the car at the time in question." It is, of course, the finding of the trial court without a jury, where the evidence is conflicting, will not be disturbed unless against the weight of the evidence; and, in considering the weight of the evidence, this court necessarily, under the law, will consider the superior opportunity of the trial court in that it was held within the witness's knowledge.

V. 1928, 237 Ill. App. 2d; Wilson v. Leavelle, 237 Ill. App. 2d; 237 Ill. App. 2d.
237 Ill. App. 2d, 237 Ill. App. 2d.

The evidence of three witnesses, Dr. McLaughlin, the motorist and the carter, that the witness car struck the witness car or was struck by the witness car, is not sufficient to establish the fact of the collision. The evidence of the three witnesses, Dr. McLaughlin, the motorist and the carter, that the witness car struck the witness car or was struck by the witness car, is not sufficient to establish the fact of the collision. The evidence of the three witnesses, Dr. McLaughlin, the motorist and the carter, that the witness car struck the witness car or was struck by the witness car, is not sufficient to establish the fact of the collision.

the brakes, but, as the road was slippery, the automobile skidded and the driver undertook to turn it west; and the evidence that the impact threw the street car off the tracks to the northwest, all taken in conjunction with the evidence of the appellee's witnesses, which the trial judge may have been justified in believing, that the street car was traveling at a reasonable rate of speed, gives rise to the conclusion, in our opinion, that the appellant failed to make out his cause of action by a preponderance of the evidence.

It was claimed by appellant that the trial judge erred in admitting in evidence a conversation which was testified to as having taken place between Dr. McLaughlin, a passenger on the street car, and the driver of the automobile, immediately after the accident. Dr. McLaughlin testified as follows: "I went over and spoke to him (referring to the driver of the automobile) and said, 'What were you trying to do with us, put us out of business?' He said, looking at the car, and the gas and water was running all over the street, and he says, 'I guess the brake didn't work'." The record shows that counsel for appellant objected, but, when the trial judge said it was competent, acquiesced and, himself, stated, "It is part of the res gestae probably." We cannot consider, therefore, that any legal objection was made to the admissibility of the evidence.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

the brakes, and, as the road was slippery, the automobile
avoided and the driver attempted to turn it west; and no
evidence that the impact threw the street car off the tracks
to the northwest, all taken in connection with the evidence
of the appellee's witnesses, which the trial judge may have
been justified in believing, that the street car was travel-
ing at a reasonable rate of speed, gives rise to the con-
clusion, in our opinion, that the appellee failed to make
out his case of action by a preponderance of the evidence.
It was claimed by appellant that the trial
judge erred in admitting in evidence a conversation which
was testified to as having taken place between Mr. McWhorter
a passenger on the street car, and the driver of the automo-
bile, immediately after the accident. Mr. McWhorter testi-
fied as follows: "I went over and spoke to him (referring
to the driver of the automobile) and said, 'What were you
trying to do with me, and what did you do with me?' He said,
looking at the car, and the gas and water was running all
over the street, and he says, 'I guess the water didn't work.'"
The record shows that counsel for appellant objected, but,
when the trial judge said it was competent, admitted and,
himself, stated, "It is part of the res gestae probably."
We cannot consider, therefore, that any legal objection was
made to the admissibility of the evidence.
Finding no error in the record the judgment
is affirmed.

17-11111

298 - 23643

NORMAN CARROLL,

Appellee,

vs.

A. GOLDSTEIN,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

211 I.A. 315

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought by the appellee against the appellant for damages for a breach of a contract to purchase certain real estate. Appellee having recovered a verdict and judgment in the sum of \$437.50, this appeal was taken therefrom.

The theory of the appellee is that appellant promised to buy a certain ten lots - upon which appellee's commission would be \$437.50 - providing the appellee would bring about a sale of certain property which appellant then owned; that appellee carried out his part of the bargain so that appellant's property was sold; that appellant then refused and failed to carry out his promise to buy the aforesaid ten lots, and, therefore, became liable. On the other hand it is the claim of the appellant that no binding contract was made; that there was no definite agreement as to the purchase price of the lots or as to their number and that there was no legally binding promise on the part of the appellee.

Appellee, a real estate salesman for W. H. Briti-

NORMAN CARROLL,

Appellee,

vs.

A. GOLDSTEIN,

Appellant.

ATTORNEY FROM

CHERRY COURT,

COOK COUNTY.

211 I.A. 212

MR. PRESIDING JUSTICE TAYLOR delivered the

opinion of the court.

This is a suit brought by the appellee against

the appellant for damages for a breach of a contract to purchase certain real estate. Appellee having recovered a verdict and judgment in the sum of \$437.50, this appeal was taken therefrom.

The theory of the appellee is that appellant promised to buy a certain ten lots - upon which appellee's commission would be \$437.50 - providing the appellee would bring about a sale of certain property which appellant then owned; that appellee carried out his part of the bargain; that appellant's property was sold; that appellant then refused and failed to carry out his promise to buy the aforesaid ten lots, and, therefore, became liable. On the other hand it is the claim of the appellant that no binding contract was made; that there was no definite agreement as to the purchase price of the lots or as to their number and that there was no legally binding promise on the part of the appellee.

gan and Co., having a contract with the latter company that he should receive a commission of seven per cent on the sale price of any lots in Marquette Manor Addition which he might sell, undertook, in the summer of 1915, to persuade the appellant to purchase certain lots in that Addition. The evidence of the appellee is to the effect that he got appellant interested in the property and told him that the lots 29 to 37 in Block 2 of Marquette Manor Addition could be bought for \$625.00 a lot, ten per cent cash and monthly payments of \$10.00 a month; that he had a number of conversations with appellant as to the property and in the early part of August, 1915, they went out to see the lots; that he "told him that he ought to take ten or fifteen of those lots; that they were worth the money and it was growing up very fast out there and it was a good place for him to build"; that appellant said he thought so too; "that he would take those lots and perhaps more of them"; that he, appellee, tried to get him to make a deposit and sign a contract; that appellee finally said "he didn't think he had quite enough money to take all those ten lots at once"; that after being further urged, appellee said, "I have got a piece of property on Western avenue, if you will help me to sell that, I will take those lots"; that appellee then responded, "I said I would look into it, and try to do it"; that at that time, at the office, they had a plat of the Addition and that the lots referred to in their conversation were the lots numbered 29 to 37 in Block 2, Marquette Manor Addition; that subsequently he, appellee, investigated the property which appellant desired to sell, and called on a number of people in re-

gan and Co., having a contract with the latter company that he should receive a commission of seven per cent on the sale price of any lots in Wardwette Manor Addition which he might sell, understood, in the summer of 1912, to persuade the applicant to purchase certain lots in that Addition. The evidence of the appellee is to the effect that he got applicant interested in the property and told him that the lots 22 to 27 in Block 2 of Wardwette Manor Addition could be bought for \$625.00 a lot, ten per cent cash and monthly payments of \$10.00 a month; that he had a number of conversations with applicant as to the property and in the early part of August, 1912, they went out to see the lots; that he "told him that he ought to take ten or fifteen of these lots; that they were worth the money and it was growing up very fast and there was a good place for him to build"; that applicant said he thought so too; that he would take these lots and perhaps more of them; that he, appellee, tried to get him to make a deposit and sign a contract; that appellee finally said "he didn't think he had quite enough money to take all those ten lots at once"; that after being further urged, appellee said, "I have got a piece of property on Western Avenue, if you will help me to sell that, I will take these lots"; that appellee then responded, "I said I would look into it, and try to do it"; that at that time, at the office, they had a plat of the Addition and that the lots referred to in their conversation were the lots numbered 22 to 27 in Block 2, Wardwette Manor Addition; that subsequently he, appellee, investigated the property which applicant desired to sell, and called on a number of people in re-

gard to it, and finally listed it with a real estate agent, Bagdziunas; that he saw the latter several times thereafter; that appellant called him up, meanwhile, and he told him he was working on it and, finally, in September, Bagdziunas told appellee he had an offer for appellant's property; that Bagdziunas then got the offer in writing and a deposit, and an offer of \$5700.00, was submitted to appellant; that afterwards, in the latter part of September, he got appellant to meet Bagdziunas and the prospective purchaser and talk the matter over; that subsequently an offer of \$6,000.00 was made to Bagdziunas, for appellant's property and that information appellee communicated to appellant and the latter went to see Bagdziunas, and on October 7, 1915, a contract for the sale of appellant's property for \$6,000.00 was made; that within a week, appellant, at the solicitation of appellee, went to the office of the latter and appellee asked him "if he was ready now to make a deposit to secure those lots. He said he didn't want to do it then but he would just as soon as he got his money out of this deal - just as soon as it was closed. He told me I need not worry that he would take care of it, that he meant to take those lots"; that subsequently he telephoned him "that the other lots were selling" and he "wanted him to get those ten lots and he said he wanted the lots but he still wanted to wait until the deal was closed."

That he, appellee, on November 4, 1915, received a check for \$30.00 as a commission, from Bagdziunas, which amount he turned over to appellant, telling the latter that he, appellee, expected to get his compensation from the

and to it, and finally lived it with a real estate agent, Bagdasarian; that he saw the latter several times thereafter; that appellant called him up, meanwhile, and he told him he was working on it and, finally, in September, Bagdasarian told appellee he had an offer for appellant's property; that Bagdasarian then got the offer in writing and a deposit, and an offer of \$2000.00, was submitted to appellant; that afterwards, in the latter part of September, he got appellant to meet Bagdasarian and the prospective purchaser and talk the matter over; that subsequently an offer of \$2,000.00 was made to Bagdasarian, for appellant's property and that information appellant communicated to appellant and the latter went to see Bagdasarian, and on October 7, 1915, a contract for the sale of appellant's property for \$2,000.00 was made; that within a week, appellant, at the solicitation of appellee, went to the office of the latter and appellee asked him "if he was ready now to make a deposit to secure those lots. He said he didn't want to do it then but he would just as soon as he got his money out of this deal - just as soon as it was closed. He told me I need not worry that he would take care of it, that he meant to take those lots"; that subsequently he telephoned him "that the other lots were selling" and he "wanted him to get those two lots and he said he wanted the lots but he still wanted to wait until the deal was closed."

That he, appellee, on November 4, 1915, received a check for \$30.00 as a commission, from Bagdasarian, which amount he turned over to appellant, telling the latter that he, appellee, expected to get his commission from the

Marquette Manor Addition sale; that appellant "accepted the check and said that was all right - that was according to his understanding"; that appellant then gave him a receipt for \$30.00, "being refund of his commission for sale of my Western Avenue property;" that subsequently, appellee had a number of conversations with appellant in regard to the purchase of the lots in Marquette Manor Addition; that about the first of December, 1915, he asked him to "take up those lots, that is, make a deposit on them"; "and he objected, saying there was plenty of time"; "that he didn't want to do it just then but * * * that he would do it"; that again, within the week, appellant said he would "make up a contract"; that he did not want to do it until later; that the contract of appellee with his employer Britigan was that he should receive seven per cent commission, which, on the ten lots in question, at \$625.00 a piece, amounted to \$437.50; that none of the lots in question up to the time of the trial had been sold; The evidence of the witness Deck was to the effect that on a certain Saturday in October or November, 1915, she heard appellee ask appellant "if he was ready to take the ten lots that he had promised to take"; that appellant said, "Well, he would be willing to take them as soon as his business - as soon as the deal was closed - the Western Avenue deal was closed, but he didn't have the money to take them right away"; that appellee asked appellant, "how soon he would take the ten lots; how soon he would purchase them"; that appellant said, "he would purchase them as soon as the deal was closed on Western Avenue"; that appellant said "As soon as this is closed he would take the Manor Addition lots. The ten lots." That he would buy them as

Additional lot. The ten lots. That he would pay them as soon as this is closed he would take the Manor Avenue deal was closed, but he didn't have the money to take them right away"; that appellee asked appellant, "how soon he would take the ten lots; how soon he would purchase them"; that appellant said, "he would purchase them as soon as the deal was closed on Western Avenue"; that appellee said, "well, he would be willing to take them as soon as the ten lots that he had promised to take"; that appellee heard appellee ask appellee "if he was ready to take that on a certain Saturday in October or November, 1915, sold; The evidence of the witness Deek was to the effect lots in question up to the time of the trial had been \$425.00 a piece, amounted to \$427.50; that none of the cent commission, which, on the ten lots in question, of employer Britigan was that he should receive seven per cent until later; that the contract of appellee with his he would "make up a contract"; that he did not want to do would do it"; that again, within the week, appellee said "that he didn't want to do it just then but * * * that he them"; "and he objected, saying there was plenty of time"; him to "take up those lots, that is, make a deposit on Addition; that about the first of December, 1915, he asked in regard to the purchase of the lots in Marguerite Manor ly, appellee had a number of conversations with appellee for sale of my Western Avenue property"; that subsequently a receipt for \$30.00, "being refund of his commission Marguerite Manor Addition sale; that appellee "accepted the check and said that was all right - that was record- ing to his understanding"; that appellee then gave him

soon as the deal was closed. The evidence of Williams, is to the effect that on a certain Saturday in August, 1915, he heard appellant say that he would like to buy the lots if appellee "could dispose of some property he has got on Western Avenue - if he could do that why he would be in a position to buy ten or probably fifteen lots, but he would take ten for a certainty if Mr. Carroll could dispose of his property"; that appellee said, "Well, I will call and look into it and see what I can do." The evidence of the witness Wigman is to the effect that he heard some conversation between appellee and appellant; that appellant had some other property on Western Avenue; that if he didn't have that property he would buy some lots; that appellant said that he would look into the matter of the Western Avenue property.

The appellant Goldstein admitted that he went out to see the property but testified that as there was neither water nor sewer in, he told appellee he could not use the lots; that he never told appellee that he would buy the lots after he had sold the Western Avenue property; that nothing was said when the check for \$30.00, as part of the commission was returned to him; that that deal was closed on November 4, 1915.

It is contended by the appellant that the conduct of the parties as shown by the evidence did not create an obligation rendering him liable to suit by the appellee. On the other hand, the appellee claims that the appellant, having promised to purchase the lots providing appellee enabled appellant to sell his property, and

soon as the deal was closed. The evidence of Williams, as to the effect that on a certain Saturday in August, 1915, he heard appellant say that he would like to buy the lots if appellee "could dispose of some property he has got on Western Avenue - if he could do that why he would be in a position to pay ten or probably fifteen lots, but he would take ten for a certainty if Mr. Carroll could dispose of his property"; that appellee said, "Well, I will call and look into it and see what I can do." The evidence of the witness Wiman as to the effect that he heard some conversation between appellee and appellant; that appellant had some other property on Western Avenue; that if he didn't have that property he would buy some lots; that appellant said that he would look into the matter of the Western Avenue property.

The appellant Goldstein admitted that he went out to see the property but testified that as there was neither water nor sewer in, he told appellee he could not use the lots; that he never told appellee that he would buy the lots after he had sold the Western Avenue property; that nothing was said when the check for \$30.00, as part of the commission was returned to him; that that deal was closed on November 4, 1915.

It is contended by the appellant that the conduct of the parties as shown by the evidence did not create an obligation rendering him liable to suit by the appellee. On the other hand, the appellee claims that the appellant, having promised to purchase the lots providing appellee enabled appellant to sell his property, and

appellee having given his services, which resulted in the sale of appellant's property, appellant thereby became bound. When the appellant stated to the appellee that he would buy the ten lots providing appellee brought about the sale of appellant's property, it was in the nature of a continuing offer on the part of appellant, and the moment the consideration was furnished on the part of appellee, that is, the services rendered which resulted in the sale of appellant's property, there came into existence a unilateral contract, executed on the part of appellee and binding appellant to purchase the lots in question. It may well be that, at any time before the services were rendered by appellee, the offer of appellant might have been withdrawn, but, not being withdrawn and appellant's property having been sold, through the help of appellee, it gave rise to a binding obligation on the part of appellant. Plumb v. Campbell, 129 Ill. 101. As to the matter of definiteness of the terms; the evidence shows sufficiently clearly that the offer on the part of appellant related to ten particular lots at a given price.

It is contended by appellant that the alleged contract, not being in writing, was void under the Statute of Frauds. Inasmuch, however, as appellant in his affidavit of merits makes no mention whatever of that defense, that claim of the appellant is untenable. Clayton v. Lemen, 233 Ill. 435. In the latter case the court said, "If the Statute of Frauds is not pleaded, the case must be considered and decided without reference to it and it cannot be considered in this court when not pleaded in the court below." Finucan v. Kendig, 109 Ill. 198; Sanford v. Datis,

applies having given his services, which resulted in the sale of applicant's property, applicant thereby became bound. When the applicant stated to the applicant that he would pay the fees for providing applicant proceeds about the sale of applicant's property, it was in the nature of a continuing offer on the part of applicant, and the moment the consideration was furnished on the part of applicant, that is, the services rendered which resulted in the sale of applicant's property, there came into existence a unilateral contract, executed on the part of applicant and binding applicant to purchase the loss in question. It may well be that, at any time before the services were rendered by applicant, the offer of applicant might have been withdrawn, but, not being withdrawn and applicant's property having been sold, through the help of applicant, it gave rise to a binding obligation on the part of applicant. Jump v. Campbell, 109 Ill. 101. As to the matter of definiteness of the terms, the evidence shows sufficiently clearly that the offer on the part of applicant related to a particular loss at a given price.

It is contended by applicant that the alleged contract, not being in writing, was void under the statute of frauds. However, as applicant in his affidavit of notice makes no mention whatever of that defense, that claim of the applicant is untenable. Croft v. Lewis, 235 Ill. 430. In the latter case the court said, "If the defense of fraud is not pleaded, the case must be considered and decided without reference to it and it cannot be considered in this court when not pleaded in the court below." Winn v. Kordyk, 109 Ill. 115; Harford v. Davis.

181 id. 570; Highley v. Metzger, 187 id. 237; McClure v. Otrich, 118 id. 320. As to the instruction complained of, we are of the opinion that it was, under the circumstances, entirely unobjectionable.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

181 id. 570; McClure v. McGraw, 187 id. 337; McClure v. McGraw, 118 id. 320. As to the instruction complained of, we are of the opinion that it was, under the circumstances, entirely unobjectionable.

Finding no error in the record the judgment is

affirmed.

APPEAL.

322 - 23667

JOHN F. KERNAN, JR.,

Appellee.)

211 I.A. 316

VS.

ADVANCE TERRA COTTA COM-
PANY, a corporation,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

Appellee, having worked for the appellant from
May 23, 1914, until September 24, 1914 - when he was dis-
charged by the appellant - brought suit claiming that he
had a contract of employment with appellant for a full
year at the rate of \$25., per week, and that there was
due him for the unexpired part of that year, the sum of
\$650. There was a jury trial, a verdict for \$200., and
judgment entered thereon, from which this appeal is pro-
secuted.

The appellant contends that (1) no valid contract
for any definite period was shown to have existed; (2) that
appellee was incompetent and was discharged for cause; (3)
that appellee did not use reasonable diligence to obtain em-
ployment for the remainder of the alleged term.

(1) There seems to have been ample evidence tend-
ing to prove an oral contract of employment from May 23, 1914,
until May 23, 1915. The answer of the president of the appell-
ant company to the question put by the appellee as to an

211 I.A. 316

MUNICIPAL COURT
OF CHICAGO.

Appellant.

ADVANCE TERRA COTTA CO.,
BANK, a corporation,

vs.

THE CHICAGO TRIBUNE, Defendant.

opinion of the court.

Appellant, having worked for the defendant from May 23, 1914, until September 24, 1914 - when he was discharged by the defendant - brought suit claiming that he had a contract of employment with appellant for a full year at the rate of \$25.00 per week, and that there was due him for the unexpired part of that year, the sum of \$650. There was a jury trial, a verdict for \$200.00, and judgment entered thereon, from which this appeal is prosecuted.

The appellant contends that (1) no valid contract for any definite period was shown to have existed; (2) that appellee was incompetent and was discharged for cause; (3) that appellee did not use reasonable diligence to obtain employment for the remainder of the alleged term.

(1) There seems to have been ample evidence tending to prove an oral contract of employment from May 23, 1914, until May 23, 1915. The answer of the defendant of the appeal and company to the question put by the appellee as to an

understanding concerning his employment, "Yes, Jack, starting today we will pay you \$25., a week for one year", is sufficient, especially when taken in conjunction with the testimony of the president of the appellant company, that the appellee would be paid \$25., a week "for the next year" and the further fact that there is no material evidence to the contrary.

Counsel for appellant claim that "while the testimony shows the intention of the parties to fix the plaintiff's salary at the advanced figure - that is \$25.00 per week - it certainly does not show any intention by either of them, at that time, to contract for a year, or any definite length of time." In view of the testimony of both the appellee and the president of the company, we cannot agree with that contention. We are of the opinion that the evidence justified the jury in concluding that there was an oral contract of employment for the period of one year.

(2) As to the right of the appellant to discharge the appellee for incompetency; The evidence shows that the appellee was employed to take charge of the payroll, keep the time, answer correspondence, do certain clerical work, keep track of all the supplies and do certain work outside the factory, and appellant undertook to prove that the appellee in doing his work made a number of errors in figures in the compilation of certain payrolls, eight in number, which errors were made between July 3, 1914 and September 5, 1914; also, that appellee was not sufficiently attentive to his work. That matter, however, was an appropriate subject for the consideration of the jury and, in view of the evidence on that subject, which is unconvincing, we are not inclined to disturb

understanding concerning his employment, "Yes, Jack, starting today we will pay you \$15.00 a week for one year", in testimony, especially when taken in conjunction with the testimony of the defendant in the appeal company, that the appellee would be paid \$15.00 a week for the next year, and the further fact that there is no material evidence to the contrary.

Counsel for appellant claims that "while the

testimony shows the intention of the parties to fix the plaintiff's salary at the advanced figure - that is \$15.00 per week - it certainly does not show any intention by either of them, at that time, to contract for a year, or any definite length of time." In view of the testimony of both the appellee and the president of the company, we cannot agree with that contention. We are of the opinion that the evidence justified the jury in concluding that there was an oral contract of employment for the period of one year.

(2) As to the right of the appellant to discharge the appellee for incompetency; the evidence shows that the appellee was employed to take charge of the payroll, keep the time, answer correspondence, do certain clerical work, keep track of all the supplies and do certain work outside the factory, and appellant undertakes to prove that the appellee in doing his work made a number of errors in figures in the distribution of certain payrolls, eight in number, which errors were made between July 2, 1914 and September 8, 1914; also, that the appellee was not sufficiently attentive to his work. That matter, however, was an appropriate subject for the consideration of the jury and, in view of the evidence on that subject, which is uncontradicted, we are not inclined to disturb

their finding.

(2) As to the diligence of the appellee in obtaining other employment; He testified as to what efforts he made to secure employment and also that he obtained employment on March 3, 1915. There is no evidence denying his statements as to his diligence and no affirmative evidence whatever, on the part of the appellant, on that subject. Fuller v. Little, 61 Ill. 21. The Mount Hope Cemetery Assn. v. Weidenmann, 139 Ill. 67.

By what method of computation the jury arrived at the verdict of \$200., of course, we do not know. The evidence of the appellee is to the effect that subsequent to his discharge he sought employment at various places and finally went to work on March 3 (presumably 1915) for the Board of Review, at \$100., a month; that he was out of work twenty-two weeks and three days. No evidence was offered by the appellant on that subject. It may be that the jury were of the opinion, from the evidence, that appellee did not exercise reasonable diligence in seeking new employment during the interim, and so fixed the damages at \$200. Counsel for appellant contend that as the verdict was \$200., it must have been the result of a compromise, and, therefore, should not be allowed to stand. With that conclusion, however, we cannot agree. Although there is considerable disparity between the amount of the verdict and the amount claimed, we do not feel justified in overruling the judgment of the jury.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

their finding.

(2) As to the diligence of the applicant in obtaining other employment; he testified as to what efforts he made to secure employment and also that he obtained employment on March 3, 1915. There is no evidence denying his statements as to his diligence and no affirmative evidence whatever, on the part of the applicant, as to that subject.

Miller v. Little, 61 Ill. 21. The Mount Hope Cemetery Association v. Weidenman, 139 Ill. 67.

By what method of computation the jury arrived at the verdict of \$200., of course, we do not know. The evidence of the applicant is to the effect that subsequent to his discharge he sought employment at various places and finally went to work on March 3 (presumably 1915) for the Board of Review, at \$100. a month; that he was out of work twenty-two weeks and three days. No evidence was offered by the applicant on that subject. It may be that the jury were of the opinion, from the evidence, that applicant did not exercise reasonable diligence in seeking new employment during the interim, and so fixed the damages at \$200. Of course for applicant to contend that as the verdict was \$200., it must have been the result of a compromise, and, therefore, should not be allowed to stand. With that conclusion, however, we cannot agree. Although there is considerable disparity between the amount of the verdict and the amount claimed, we do not feel justified in overturning the judgment of the jury.

Finding no error in the record the judgment is

affirmed.

234 - 23679

FRANK H. MORGAN,

Appellee,

vs.

ARTHUR G. VIERLING,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 317

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The trial court, on February 13, 1917, having entered judgment by confession for \$42.50 and \$20.00 attorneys' fees, for a month's rental of an apartment, the appellant, on March 12, 1917, moved to vacate the judgment and in support thereof filed two affidavits. That motion was overruled and this appeal taken therefrom. The defense undertaken to be set up by way of affidavits is that appellant was constructively evicted by reason of the failure of appellee to heat the premises as provided for in the lease.

The affidavits show that appellant leased the apartment from the appellee for a term beginning October 1, 1916 and expiring September 30, 1918; that appellant occupied the apartment as a residence for his family, consisting of himself and wife; that the lease, which was in writing, provided "that said lessor shall furnish the heat for the heating apparatus in said building at all reasonable hours of day and evening when necessary, from the 1st of October of each year to the 30th of April of the following year, but it is * * * agreed that the lessor shall not be liable for damages for failure to furnish heat for said

FRANK N. MORAN,

Appellee,

vs.

ARTHUR G. VIERLING,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDENT JUSTICE TAYLOR delivered the opinion of the court.

The trial court, on February 13, 1917, having entered judgment by confession for \$42.50 and \$20.00 attorney's fees, for a month's rental of an apartment, the appellee, on March 12, 1917, moved to vacate the judgment and in support thereof filed two affidavits. That motion was overruled and this appeal taken therefrom. The defense undertaken to be set up by way of affidavits is that appellee was constructively evicted by reason of the failure of appellee to heat the premises as provided for in the lease.

The affidavits show that appellee leased the apartment from the appellee for a term beginning October 1, 1916 and expiring September 30, 1918; that appellant occupied the apartment as a residence for his family, consisting of himself and wife; that the lease, which was in writing, provided that said lessor shall furnish the heat for the heating apparatus in said building at all reasonable hours of day and evening when necessary, from the 1st of October of each year to the 30th of April of the following year, but it is * * * agreed that the lessor shall not be liable for damages for failure to furnish heat for said

apartment as herein agreed and the lessee expressly waives all right or claim for such damages as well as all right to claim an eviction in case the lessor shall be unavoidably delayed in or from furnishing said heat."

The affidavits, as far as they pertain to the defense of a constructive eviction, substantially, recite (1) that the landlord failed to furnish heat at all reasonable hours; (2) that by reason of the failure to heat the premises the lessee's family was unable to continue in occupation of the premises; (3) that they were not supplied with heat as required by the lease; (4) that the lessee sent written complaints of the lack of heat on November 25 and December 14, 1916, January 10, February 1 and February 3, 1917; (5) that after November 25, 1916, there continued to be lack of heat; (6) that for several days prior to December 14, 1916, there was less than 60 degrees of heat in the premises; (7) that on February 1, 1917, they were heated to a less degree than 50 degrees; (8) that on February 3, 4, 5, 6, and 7, 1917, the condition was not remedied, but during all the said time the premises were heated to a less degree of temperature than 50 degrees; (9) that on February 8, 1917, it became unsafe for his wife, who was approaching confinement, to remain longer, owing to the want of heat.

As it is the law, that a failure on the part of a landlord to provide heat as required by the terms of a lease, may constitute a constructive eviction (Lawler v. McNamara, 203 Ill. App. 285) the question in the instant case is, whether the appellee, by his affidavits, has recited such facts, which, if proven, would establish a con-

apartment as herein agreed and the lessee expressly waives all right or claim for such damages as well as all right to claim an eviction in case the lessor shall be unavoidably delayed in or from furnishing said heat."

The affidavits, as far as they pertain to the defense of a constructive eviction, substantially, recite (1) that the landlord failed to furnish heat at all reasonable hours; (2) that by reason of the failure to heat the premises the lessee's family was unable to continue its occupation of the premises; (3) that they were not supplied with heat as required by the lease; (4) that the lessee sent written complaints of the lack of heat on November 25 and December 14, 1916, January 10, February 1 and February 3, 1917; (5) that after November 25, 1916, there continued to be lack of heat; (6) that for several days prior to December 14, 1916, there was less than 50 degrees of heat in the premises; (7) that on February 1, 1917, they were heated to a less degree than 50 degrees; (8) that on February 3, 4, 5, 6, and 7, 1917, the condition was not remedied, but during all the said time the premises were heated to a less degree of temperature than 50 degrees; (9) that on February 8, 1917, it became unsafe for his wife, who was approaching confinement, to remain longer, owing to the want of heat.

As it is the law, that a failure on the part of a landlord to provide heat as required by the terms of a lease, may constitute a constructive eviction (Lawler v. ..., 203 Ill. App. 282) the question in the instant case is, whether the affidavits, by the lessee, has recited such facts, which, if proven, would establish a con-

structive eviction for want of heat as provided for in the lease. We are of the opinion that the affidavits, taken together, do set up such facts as constitute a good and meritorious defense. In Levinson v. Pieser (Gen. No. 20169) this court held that a certain affidavit was insufficient on the ground that the material allegations therein were of too general a character, and the following language was used, "Neither the number nor the duration of the different occasions complained of is stated", and, further, that nothing was recited that showed that the "alleged wrongful acts or omissions were not of the most trifling character." In the instant case, however, the recitations of fact are quite explicit - giving both temperature and time - and it is very obvious that if they were true, the premises were not sufficiently heated for residence purposes and as required by the terms of the lease .

As to the contention concerning the words in the lease "the lessee expressly waives all right * * * to claim an eviction in case the lessor shall be unavoidably delayed in and from furnishing said heat", we do not consider that it was necessary for the appellant, in his affidavits, to recite that the appellee was not unavoidably delayed in furnishing heat. In the trial of such a case as this, it is not necessary for the defendant, in making out a prima facie defense of constructive eviction, to negative matters in defeasance of the action, that is, to prove that the landlord was not unavoidably delayed in furnishing heat. The burden of proving the latter would be upon the landlord himself, and, that is because the subject-matter of the negative averment lies peculiarly within the knowledge of

attractive eviction for want of heat as provided for in the lease. We are of the opinion that the affidavits, taken together, do set up such facts as constitute a good and meritorious defense. In Levinson v. Plesner (Gen. No. 30189) this court held that a certain affidavit was insufficient on the ground that the material allegations therein were of too general a character, and the following language was used, "Neither the number nor the duration of the different occasions complained of is stated", and, further, that nothing was mentioned that showed that the "alleged wrongful acts or omissions were not of the most trifling character." In the instant case, however, the recitations of fact are quite explicit - giving both temperature and time - and it is very obvious that if they were true, the premises were not sufficiently heated for residence purposes and as required by the terms of the lease.

As to the contention concerning the words in the lease "the lessee expressly waives all right * * * to claim an eviction in case the lessor shall be unavoidably delayed in and from furnishing said heat", we do not consider that it was necessary for the appellant, in his affidavit, to recite that the appellee was not unavoidably delayed in furnishing heat. In the trial of such a case as this, it is not necessary for the defendant, in making out a prima facie defense of constructive eviction, to negative matters in defendant's favor, that is, to prove that the landlord was not unavoidably delayed in furnishing heat. The burden of proving the latter would be upon the landlord himself, and that is because the subject-matter of the negative averment lies peculiarly within the knowledge of

the landlord himself. Greenleaf, Evid. Vol. 1, Sec. 79;
Williams v. The People, 121 Ill. 84; Prentice v. Crane, 234
Ill. 302; Great Western R. R. Co. v. Bacon, 30 Ill. 347.

We are of the opinion that the trial court erred
and the judgment should have been vacated and the defendant
given an opportunity to put in his defense. The judgment,
accordingly, is reversed and the cause remanded.

REVERSED AND REMANDED.

the landlord himself. Greenleaf, 12th. Vol. I, Sec. 72;
Williams v. The People, 12 Ill. 24; Pratt v. Green, 234
Ill. 303; Great Western R. Co. v. Bacon, 30 Ill. 247.

We are of the opinion that the trial court erred
and the judgment should have been vacated and the defendant
given an opportunity to put in his defense. The judgment,
accordingly, is reversed and the cause remanded.

REVEREND AND HONORABLE.

440 - 23785

FRANK H. MORGAN,

Appellee,

vs.

ARTHUR G. VIERLING,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 319

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This appeal involves, in substance, similar facts and principles as were the subject for consideration in Morgan v. Vierling, Gen. No. 23679. Our opinion in the latter case, therefore, is controlling here.

The judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

440 - 23732

FRANK M. MORGAN,

Appellee,

MUNICIPAL COURT

OF CHICAGO.

vs.

ARTHUR G. VIERLING,

Appellant.

211 A. 319

MR. PRESIDING JUSTICE TAYLOR delivered the

opinion of the court.

This appeal involves, in substance, similar facts and principles as were the subject for consideration in Morgan v. Vierling, Gen. No. 23672. Our opinion in the latter case, therefore, is controlling here.

The judgment of the trial court is reversed

and the cause remanded.

REVERSED AND REMANDED.

413 - 23758

NANNIE MILES,

Appellee

vs.

INTERNATIONAL HOTEL
COMPANY,

Appellant

211 I.A. 323

Appeal from

Superior Court

Cook County

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellee brought suit against the appellant for the value of a trunk and its contents alleged to be worth \$3,000, and which she claimed appellant had accepted for storage as a bailee and had thereafter lost. A trial by jury in the Superior Court resulted in a verdict and judgment against appellant in the sum of \$1,097.

The facts in the case - outside of those bearing on appellant's care - are substantially the same as those recited in the case of Miles v. Int. Hotel Co., 167 Ill. App. 440. On November 30, 1904, appellee registered at the hotel of the appellant and was assigned Room 301, with the understanding that she was to pay a special rate of One Dollar per day, or Seven Dollars per week, as she had announced that she would be there for some time. The regular price of the room was \$1.50 per day. The property she took with her to the hotel and to her room consisted of a trunk, suit case and bird cage. She occupied the room until May 30, 1905, when, in preparation for leaving, according to her testimony, she called a bell-boy and told him that she was going away and would be gone

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Appellee's motion for summary judgment is denied.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

has a total of 1,000,000 shares of common stock

has called an agent for delivery.

TO: [redacted] FROM: [redacted]

7-20-64

1971-1972

The focus in the case - *United*

of those people in the world - and the fact -

early to come out in daylight and we were not visible

v. 5. 1960. 100. 111. 122. 133. 144. 155. 166. 177. 188. 199. 200. 211. 222. 233. 244. 255. 266. 277. 288. 299. 300. 311. 322. 333. 344. 355. 366. 377. 388. 399. 400. 411. 422. 433. 444. 455. 466. 477. 488. 499. 500. 511. 522. 533. 544. 555. 566. 577. 588. 599. 600. 611. 622. 633. 644. 655. 666. 677. 688. 699. 700. 711. 722. 733. 744. 755. 766. 777. 788. 799. 800. 811. 822. 833. 844. 855. 866. 877. 888. 899. 900. 911. 922. 933. 944. 955. 966. 977. 988. 999. 1000. 1011. 1022. 1033. 1044. 1055. 1066. 1077. 1088. 1099. 1100. 1111. 1122. 1133. 1144. 1155. 1166. 1177. 1188. 1199. 1200. 1211. 1222. 1233. 1244. 1255. 1266. 1277. 1288. 1299. 1300. 1311. 1322. 1333. 1344. 1355. 1366. 1377. 1388. 1399. 1400. 1411. 1422. 1433. 1444. 1455. 1466. 1477. 1488. 1499. 1500. 1511. 1522. 1533. 1544. 1555. 1566. 1577. 1588. 1599. 1600. 1611. 1622. 1633. 1644. 1655. 1666. 1677. 1688. 1699. 1700. 1711. 1722. 1733. 1744. 1755. 1766. 1777. 1788. 1799. 1800. 1811. 1822. 1833. 1844. 1855. 1866. 1877. 1888. 1899. 1900. 1911. 1922. 1933. 1944. 1955. 1966. 1977. 1988. 1999. 2000. 2011. 2022. 2033. 2044. 2055. 2066. 2077. 2088. 2099. 2100. 2111. 2122. 2133. 2144. 2155. 2166. 2177. 2188. 2199. 2200. 2211. 2222. 2233. 2244. 2255. 2266. 2277. 2288. 2299. 2300. 2311. 2322. 2333. 2344. 2355. 2366. 2377. 2388. 2399. 2400. 2411. 2422. 2433. 2444. 2455. 2466. 2477. 2488. 2499. 2500. 2511. 2522. 2533. 2544. 2555. 2566. 2577. 2588. 2599. 2600. 2611. 2622. 2633. 2644. 2655. 2666. 2677. 2688. 2699. 2700. 2711. 2722. 2733. 2744. 2755. 2766. 2777. 2788. 2799. 2800. 2811. 2822. 2833. 2844. 2855. 2866. 2877. 2888. 2899. 2900. 2911. 2922. 2933. 2944. 2955. 2966. 2977. 2988. 2999. 3000. 3011. 3022. 3033. 3044. 3055. 3066. 3077. 3088. 3099. 3100. 3111. 3122. 3133. 3144. 3155. 3166. 3177. 3188. 3199. 3200. 3211. 3222. 3233. 3244. 3255. 3266. 3277. 3288. 3299. 3300. 3311. 3322. 3333. 3344. 3355. 3366. 3377. 3388. 3399. 3400. 3411. 3422. 3433. 3444. 3455. 3466. 3477. 3488. 3499. 3500. 3511. 3522. 3533. 3544. 3555. 3566. 3577. 3588. 3599. 3600. 3611. 3622. 3633. 3644. 3655. 3666. 3677. 3688. 3699. 3700. 3711. 3722. 3733. 3744. 3755. 3766. 3777. 3788. 3799. 3800. 3811. 3822. 3833. 3844. 3855. 3866. 3877. 3888. 3899. 3900. 3911. 3922. 3933. 3944. 3955. 3966. 3977. 3988. 3999. 4000. 4011. 4022. 4033. 4044. 4055. 4066. 4077. 4088. 4099. 4100. 4111. 4122. 4133. 4144. 4155. 4166. 4177. 4188. 4199. 4200. 4211. 4222. 4233. 4244. 4255. 4266. 4277. 4288. 4299. 4300. 4311. 4322. 4333. 4344. 4355. 4366. 4377. 4388. 4399. 4400. 4411. 4422. 4433. 4444. 4455. 4466. 4477. 4488. 4499. 4500. 4511. 4522. 4533. 4544. 4555. 4566. 4577. 4588. 4599. 4600. 4611. 4622. 4633. 4644. 4655. 4666. 4677. 4688. 4699. 4700. 4711. 4722. 4733. 4744. 4755. 4766. 4777. 4788. 4799. 4800. 4811. 4822. 4833. 4844. 4855. 4866. 4877. 4888. 4899. 4900. 4911. 4922. 4933. 4944. 4955. 4966. 4977. 4988. 4999. 5000. 5011. 5022. 5033. 5044. 5055. 5066. 5077. 5088. 5099. 5100. 5111. 5122. 5133. 5144. 5155. 5166. 5177. 5188. 5199. 5200. 5211. 5222. 5233. 5244. 5255. 5266. 5277. 5288. 5299. 5300. 5311. 5322. 5333. 5344. 5355. 5366. 5377. 5388. 5399. 5400. 5411. 5422. 5433. 5444. 5455. 5466. 5477. 5488. 5499. 5500. 5511. 5522. 5533. 5544. 5555. 5566. 5577. 5588. 5599. 5600. 5611. 5622. 5633. 5644. 5655. 5666. 5677. 5688. 5699. 5700. 5711. 5722. 5733. 5744. 5755. 5766. 5777. 5788. 5799. 5800. 5811. 5822. 5833. 5844. 5855. 5866. 5877. 5888. 5899. 5900. 5911. 5922. 5933. 5944. 5955. 5966. 5977. 5988. 5999. 6000. 6011. 6022. 6033. 6044. 6055. 6066. 6077. 6088. 6099. 6100. 6111. 6122. 6133. 6144. 6155. 6166. 6177. 6188. 6199. 6200. 6211. 6222. 6233. 6244. 6255. 6266. 6277. 6288. 6299. 6300. 6311. 6322. 6333. 6344. 6355. 6366. 6377. 6388. 6399. 6400. 6411. 6422. 6433. 6444. 6455. 6466. 6477. 6488. 6499. 6500. 6511. 6522. 6533. 6544. 6555. 6566. 6577. 6588. 6599. 6600. 6611. 6622. 6633. 6644. 6655. 6666. 6677. 6688. 6699. 6700. 6711. 6722. 6733. 6744. 6755. 6766. 6777. 6788. 6799. 6800. 6811. 6822. 6833. 6844. 6855. 6866. 6877. 6888. 6899. 6900. 6911. 6922. 6933. 6944. 6955. 6966. 6977. 6988. 6999. 7000. 7011. 7022. 7033. 7044. 705

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and a similar room with the number 201, with the number 201

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that because he was so, that he would never be

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to be met to the hotel and to her room occupied at

It is a very common bird in the country.

will pay \$5,000, which is payment for labor,

RECEIVED FOR THE DIRECTOR, FBI

Wages and hours have been up for one year and 10 cents.

some time; and, as she would like to have her trunk taken care of, asked him to ascertain if she could leave her trunk, and what the charges would be, if any, and that he reported that the clerk would take care of the trunk and that there would be no charges. On that day she left the hotel and returned sometime in March, 1906, nearly a year later, and, after registering, requested that her trunk be sent up to her room. The trunk, however, could not be found and was at no time thereafter returned to her.

There was a baggage room in the basement, which was in charge of Murray, the head porter; that room was kept locked and the day porter, the head porter and the night porter had access to it, and no one else save the office men.

In the room which was occupied by the appellee there was posted a "Notice to Guests" which, in part, was as follows: "All baggage of guests left with us in storage will receive our best attention, for which no charge will be made, but in case of accident by fire or water or damage of any kind, it will be at the risk of the owner."

When this cause was in this court before for review we announced that the trial court erred in refusing to admit evidence that "the porter, night-watchman and baggage room keeper employed by it were competent employees and that they were considered by appellant to be competent when they were employed."

It now reappears, after another trial, and the present record shows that considerable evidence was offered tending to overcome the presumption of negligence arising by reason of the prima facie case

some time; and, as she would like to have her trunk
 taken care of, asked him to ascertain if she could
 leave her trunk, and what the charges would be, if
 any, and that he reported that the clerk would take
 care of the trunk and that there would be no charges.
 On that day she left the hotel and returned sometime
 in October, 1936, exactly a year later, and, after regis-
 tering, requested that her trunk be sent up to her
 room. The trunk, however, could not be found and
 was at no time thereafter returned to her.

There was a hallway room in the
 basement, which was in charge of another, the head
 porter; that room was kept locked and the key porter,
 the head porter and the night porter had access to it,
 and no one else save the office men.

In the room which was occupied by
 the appellee there was posted a notice to guests
 which, in part, was as follows: "All baggage of
 guests left with us in storage will receive our best
 attention, for which no charge will be made, but in
 case of accident or fire or other or damage of any
 kind, it will be at the risk of the owner."

When this case was in trial court
 before for review we announced that the trial court
 erred in refusing to admit evidence that "the porter,
 night-watchman and baggage room keeper employed by it
 were competent witnesses and that their testimony was
 sufficient to be competent when they were admitted."

It was remanded, after another
 trial, and the present record shows that considerable
 evidence was offered tending to overcome the presumption
 of negligence arising by reason of the prima facie case

made out by the appellee. It is contended, however, by the latter, that that evidence is insufficient. The particular employees whose employment, character and conduct were of importance were Clark, a day porter; Murray, the head porter; Kemp, night watchman and night porter; and George Carr, a porter. Murray had been employed by the appellant for about three years; Kemp, for two years (but had been with the hotel for ten years before appellant bought it); Carr for two and one-half years. The clerk, Licht, testified that Clark and Murray were very good porters. The evidence concerning the above named employees, their employment and character - which is not controverted - tends to show that appellant used normal business care and judgment in their selection and employment. It also shows that no complaints were ever made with reference to property or baggage entrusted to their care, or in regard to their honesty or competency. Licht, the chief clerk, testified that they never had any complaints of trunks or baggage being lost; and that the number of porters and nightwatchmen was sufficient. Teich, one of the managers, testified that as far as he knew no such trunk was ever left at the appellant's hotel. It was the practice to issue checks for baggage, but the evidence shows appellee had no check for her trunk. She claimed that the reason she had no check was because she left so hurriedly. She testified, also, that when she left she paid Miss Nelson, the bookkeeper, but the latter said she did not, and Licht, the clerk, testified that he received the money, Twenty-six Dollars, on May 29, 1905, and that the entry of it on the cash sheet is in his handwriting.

Under the peculiar circumstances of this case, it is difficult to conceive of better proof that appellant used ordinary care, than that which was offered. Of course, according to the law, ordinary care was all that was required. The notice said it "will receive our best attention * * * but in case of * * * damage of any kind, it will be at the risk of the owner." This court said, before, that "best attention" could not mean less than ordinary care and we now say that, under the circumstances of this case, it did not mean more. Counsel for the appellee claimed that it was incumbent upon appellant to show the precise circumstances surrounding the actual loss of the trunk. We are not able to accede to that claim. It is common knowledge that in large hotels, such as the one here involved, many things are lost where the proprietors, who have exercised ordinary care, may have no knowledge whatever of the circumstances surrounding the loss; and to hold them bound to prove facts of which they have no knowledge would be highly unreasonable. Appellant has proved its general practice in regard to handling and keeping baggage and has proved that the particular men who would normally, in the course of their employment, take charge of the trunk, were of good character and fit for their positions, and, as the practice which was followed was an unobjectionable one, and, as the men employed were of good character, and, as there is no evidence to the contrary save the presumption arising from the loss of the trunk, we are of the opinion that the affirmative evidence of the exercise of ordinary care on the part of the appellant is so strong that the verdict must be considered as being manifestly and clearly against the weight

Further that I have given and bestowed gold or silver

of the evidence.

The judgment will be reversed.

REVERSED.

MR. JUSTICE O'CONNOR DISSENTING:

Plaintiff made out a prima facie case, and the burden then was on the defendant to prove by a preponderance of the evidence that it had exercised ordinary care to protect plaintiff's property. The defendant, in my opinion, fell far short of this.

of the evidence.

The judgment will be reversed.

Reversed.

MR. JUSTICE O'CONNOR: I dissent.

Plaintiff made out a prima facie case, and

the burden then was on the defendant to prove by a preponderance of the evidence that it had exercised ordinary care to protect plaintiff's property. The defendant, in my opinion, fell far short of this.

269 - 23614

T. ALLEN BEALL,

Appellee,

vs.

T. L. JONES, et al

A. M. EAREL and
A. M. HONEYWELL,

Appellants.)

211 I.A. 336

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

T. Allen Beall filed his bill of complaint against Thomas L. Jones, Alfred H. Trego, A. M. Earel and A. M. Honeywell, praying for an accounting under a contract entered into between the parties, March 25, 1908, and for the removal of the trustee therein named. It was decreed that the defendants, Trego, Earel and Honeywell pay to the complainant certain specified sums, to reverse which the defendants Earel and Honeywell prosecute this appeal.

It is alleged in the bill that complainant and the defendants Trego, Earel and Jones entered into a written contract March 25, 1908, and that the defendant Honeywell signed the contract the following day. The contract is set up in hæc verba. Trego, Earel, Jones and Beall are parties of the first part, and Trego as trustee, is party of the second part. It provides that the parties of the first part will deposit with the trustee 265,000 shares of stock of the St. Helen's Mill, Ore and Power

3011 E.A. 330

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

T. ALLEN REMLI.

Appellee,

vs.

T. L. JONES, et al

A. M. EARL and
A. S. HONEYWELL.

Appellants.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

T. Allen Remli filed his bill of complaint against

Thomas L. Jones, Alfred M. Trego, A. M. Earl and A. S.

Honeywell, praying for an accounting under a contract en-

tered into between the parties, March 23, 1909, and for the

removal of the trustee therein named. It was decreed that

the defendants, Trego, Earl and Honeywell pay to the com-

plainant certain specified sums, to reverse which the de-

fendants Earl and Honeywell prosecute this appeal.

It is alleged in the bill that complainant and

the defendants Trego, Earl and Jones entered into a writ-

ten contract March 23, 1909, and that the defendant Honey-

well signed the contract the following day. The contract

is set up in pass verba. Trego, Earl, Jones and Remli

are parties of the first part, and Trego as trustee, is

party of the second part. It provided that the parties

of the first part will deposit with the trustee \$25,000

shares of stock of the St. Paul & Northern

Company, a corporation organized under the laws of the State of Washington; that the parties will each subscribe and pay to the treasurer to be selected \$5,000, less such payments as each of the parties had theretofore made on account of the St. Helen's Company; that Trego had already paid \$2,750, Earel \$2,500 and Beall \$4,510, and in addition they had executed notes in the amount of \$8,000 for the payment of which they were jointly liable; that the balance of the \$5,000 which each was to pay should be paid at the rate of \$500 per month on the 15th of each month; that the stock which was to be deposited under the agreement should be applied by the trustee and treasurer, under the direction of a majority of the beneficiaries, in the promotion of the Pacific Power & Railway Company, another corporation organized under the laws of Washington. It further provided that the trustee should hold the stock and all property and money in trust for the beneficiaries under the agreement; that the stock should be exchanged by the trustee as soon as possible for not less than 400,000 shares of the Pacific Power & Railway Company; that Trego, Earel, Beall and Honeywell should each receive at once 25,000 shares of the stock of the Pacific Power and Railways Company, (Jones being expressly excepted) provided such parties deposited with the trustee an irrevocable power of attorney authorizing him to vote such stock at any meeting; that the remaining 300,000 shares of stock be held by the trustee for the benefit of the present and future beneficiaries; that during the construction of the hydraulic and electric plant by the Pacific Power and Railway Company the trustee should vote all the stock deposited with him for directors of that company to be selected from the beneficiaries only, except that if it

Company, a corporation organized under the laws of the State of Washington; that the parties will each subscribe and pay to the treasurer to be selected \$5,000, less such payments as each of the parties had theretofore made on account of the St. Helen's Company; that there had already been paid \$2,750, of which \$2,500 and Beall \$250, and in addition they had executed notes in the amount of \$3,000 for the payment of which they were jointly liable; that the balance of the \$5,000 which each was to pay should be paid at the rate of \$500 per month on the 15th of each month; that the stock which was to be deposited under the agreement should be applied by the trustee and treasurer, under the direction of a majority of the beneficiaries, in the promotion of the Pacific Power & Railway Company, another corporation organized under the laws of Washington. It further provided that the trustee should hold the stock and all property and money in trust for the beneficiaries under the agreement; that the stock should be exchanged by the trustee as soon as possible for not less than \$100,000 shares of the Pacific Power & Railway Company; that there, Daniel, Beall and Norwaywell should each receive an equal 25,000 shares of the stock of the Pacific Power and Railway Company, (Jones being expressly excepted) provided such parties deposited with the trustee an irrevocable power of attorney authorizing him to vote such stock at any meeting; that the remaining 250,000 shares of stock be held by the trustee for the benefit of the present and future beneficiaries; that during the construction of the hydraulic and electric plant by the Pacific Power and Railway Company the trustee should vote all the stock deposited with him for directors of that company to be selected from the beneficiaries only, except that if it

was necessary to have a director resident in Washington, then such director might be voted for by the trustee. It further provided that new members might be admitted upon condition that they should be elected by a majority of the existing members and should pay \$5,000 each; that such new members should contribute and deposit with the trustee sufficient stock of the St. Helen's Company to entitle each to an exchange of 75,000 shares of the Pacific Power & Railway Company, which should be deposited in the same manner; that all profits should be held by the trustee for the benefit of the beneficiaries; that upon completion of the plant the trustee and treasurer should divide all stock, moneys and property amongst the beneficiaries, share and share alike; that the trustee should issue to each party signing the agreement when he had deposited his portion of the stock and paid the money required, a certificate reciting that the party was a beneficiary under the agreement; that such certificate should be issued to new members, "provided that not more than ten members shall be admitted to the benefits of this agreement, except by a three-fourths vote of the previously admitted members."

The bill further avers that all of the parties except Jones, on the next day executed a written agreement which recited the execution of the contract and the payments as therein stated, and provided that interest be allowed on such sums at the rate of seven per cent, until the payments had been equalized. It is further averred that the parties deposited with the trustee 265,000 shares of stock of the St. Helen's Company, of which complainant deposited

was necessary to have a director resident in Washington, then such director might be voted for by the trustees. It further provided that new members might be admitted upon condition that they should be elected by a majority of the existing members and should pay \$5,000 each; that such new members should contribute and deposit with the trustees sufficient stock of the St. Helens Company to entitle each to an exchange of 75,000 shares of the Pacific Power & Railway Company, which should be deposited in the same manner; that all profits should be paid by the trustees for the benefit of the beneficiaries; that upon completion of the plant the trustees and themselves should divide all stock, money and property amongst the beneficiaries, share and share alike; that the trustees should issue to each party signing the agreement when he had deposited his portion of the stock and paid the money required, a certificate reciting that the party was a beneficiary under the agreement; that such certificate should be issued to new members, provided that not more than ten members shall be admitted to the benefit of this agreement, except by a three-fourths vote of the previously admitted members."

The bill further avers that all of the parties except Jones, on the next day executed a written agreement which recited the execution of the contract and the payments as therein stated, and provided that interest be allowed on such sums at the rate of seven per cent, until the payments had been equalized. It is further averred that the parties deposited with the trustees \$25,000 shares of stock of the St. Helens Company, of which company was deposited

185,000 shares; that complainant executed the power of attorney as provided in the contract; that complainant paid \$490, the balance of his \$5,000 to the treasurer; that thereupon it became the duty of the trustee to issue a certificate to complainant, but that the trustee refused to do so; that the parties, except Jones, constituted the directors of the two companies, and that Trego was President; Earel, Treasurer and Honeywell, Secretary; that there was also a director resident in Washington; that it became the duty of the trustee to exchange the stock as provided in the contract, but that through conspiracy with the defendants, Earel and Honeywell, he refused to do so, and refused to issue stock in the Pacific & Railway Company to complainant. It was further averred that it was the duty of the other members to pay in the balance of the \$5,000; that since the execution of the contract Jones paid only \$1,000, and the other defendants but \$300; that there was due from Trego, \$2,000; from Earel \$2,200; from Honeywell, \$4,000, and from Jones, \$4,000; that Trego, Earel and Honeywell, being in control of the two companies, conspired to get possession of the stock belonging to complainant without adequate consideration and for that purpose had judgment confessed on one of the notes against complainant for \$1,200 and levied upon complainant's stock of the par value of \$115,000, which judgment complainant was compelled to pay. The prayer of the bill was for an accounting and that the trustee be removed.

The defendants filed a joint and several answer in which they admit the signing of the contract of March 25,

-4-

185,000 shares; that complainant exercised the power of attorney as provided in the contract; that complainant paid \$400, the balance of his \$5,000 to the treasurer; that thereupon it became the duty of the trustee to issue a certificate of ownership, but that the trustee refused to do so; that the parties, except Jones, consented the directors of the two companies, and that Trege was President; Karel, Treasurer and Honeywell, Secretary; that there was also a director residing in Washington; that it became the duty of the trustee to exchange the stock as provided in the contract, but that through conspiracy with the defendant, Karel and Honeywell, he refused to do so, and refused to issue stock in the Pacific & Railway Company to complainant. It was further averred that it was the duty of the other members to pay in the balance of the \$5,000; that since the execution of the contract Jones paid only \$1,000, and the other defendants but \$500; that there was due from Trege, \$2,000; from Karel \$2,500; from Honeywell, \$4,000, and from Jones, \$4,000; that Trege, Karel and Honeywell, being in control of the companies, conspired to get possession of the stock belonging to complainant without adequate consideration and for that purpose had judgment confessed on one of the notes against complainant for \$1,200 and levied upon complainant's stock of the par value of \$16,000, which judgment complainant was compelled to pay. The prayer of the bill was for an accounting and that the trustee be removed.

The defendants filed a joint and several answer in which they admit the signing of the contract of March 25,

1908, but averred that it was not to be effective until and unless it was executed by ten members; that it was the understanding and agreement that there should be \$50,000 in the fund, or \$5,000 from each of ten members, and that until this was done the contract was not to be effective; that copies of the contract were given to the several parties for the purpose of enabling them to solicit new members; that many persons were solicited to become members without success. Defendants denied that they deposited any stock with the trustee under the contract, or otherwise, but admit that complainant sent his stock to the trustee, which was later returned to him; that owing to the failure to secure ten members to the agreement it was abandoned and no stock was deposited under it, no certificates issued, no exchange of stock made, no trust funds received or paid out; denied that there was any payment made by any of the parties under the contract, but averred that all such payments were made by the several parties without any joint agreement between them; avers that the St. Helen's Company never had any tangible assets; that it claimed some water rights in Washington on the strength of which defendants purchased some stock from complainant; that the rights were afterwards made a part of the United States Forest Reserve, and that on account of failure of the St. Helen's Company and Pacific Power & Railway Company to proceed with their project, the National Government canceled all the rights of the two concerns; denied any conspiracy, or that there was any demand for an accounting, or that complainant is entitled to any relief.

1902, but averred that it was not to be effective until
and unless it was executed by ten members; that it was
the understanding and agreement that there should be
\$50,000 in the fund, or \$2,000 from each of ten members,
and that until this was done the contract was not to be
effective; that copies of the contract were given to the
several parties for the purpose of enabling them to solicit
new members; that many persons were solicited to become
members without success. Defendants denied that they
deposited any stock with the trustees under the contract,
or otherwise, but admit that complainant sent his stock
to the trustees, which was later returned to him; that
owing to the failure to secure ten members to the agreement
it was abandoned and no stock was deposited under it, no
certificates issued, no exchange of stock made, no trust
funds received or paid out; denied that there was any
payment made by any of the parties under the contract,
but averred that all such payments were made by the several
parties without any joint agreement between them; avers that
the St. Helen's Company never had any tangible assets; that
it claimed some water rights in Washington on the strength
of which defendants purchased some stock from complainant;
that the rights were afterwards made a part of the United
States Forest Reserve, and that on account of failure of
the St. Helen's Company and Pacific Power & Railway Company
to proceed with their project, the National Government
canceled all the rights of the two concerns; denied any
conspiracy, or that there was any demand for an accounting,
or that complainant is entitled to any relief.

The cause was referred to a master in chancery who took proofs and made a report. He found that the contract was in force and effect from the date it was executed; that the parties had hoped to secure new members, but were unsuccessful; that a year afterwards, March 26, 1909, the parties abandoned the contract and entered into another of similar import, with a few objectionable features omitted; that the second contract never went into effect; but that there should be an accounting between the parties for advances by them subsequent to the date of the contract, March 25, 1908. The master stated the account between Trego, Earel, Honeywell and complainant, Jones being omitted. The account as stated showed the amounts paid subsequent to the date of the contract as follows: Trego, \$2,258.71; Earel, \$2,713.52; Honeywell, \$3,054.87, and Beall, \$1,315. The master found that the total of these payments should be divided between the four, and that Beall should pay \$1,021.02.-- \$379.50 to Earel and \$718.85 to Honeywell. To this report complainant filed ninety objections. They were overruled and ordered to stand as exceptions. An interlocutory decree was entered by the court sustaining some of the exceptions and overruling others, and the master was ordered to restate the account in accordance with the decree. Thereafter the master withdrew the accounting part of his report only, and restated it in accordance with the decree. In this restatement complainant was given credit for the amounts expended by him prior to the date of the contract, as well as afterwards, but the defendants were not given credit for any sum paid prior to the contract, but only that which was paid out subsequent to it. To

The names was referred to a matter in January who took proofs and made a report. He found that the contract was in force and effect from the date it was executed; that the parties had agreed to secure new members, but were unsuccessful; that a year afterwards, March 25, 1908, the parties abandoned the contract and entered into another of similar import, with a few exceptional features omitted; that the second contract never went into effect; but that there should be an accounting between the parties for advances by them subsequent to the date of the contract. March 25, 1908. The master stated the account between Trege, Karel, Honeywell and Beall, and Beall, being omitted. The account as stated showed the amounts paid subsequent to the date of the contract as follows: Trege, \$2,258.71; Karel, \$2,715.52; Honeywell, \$3,054.87, and Beall, \$1,315. The master found that the total of these payments should be divided between the four, and that Beall should pay \$1,021.02, -- \$275.50 to Karel and \$718.82 to Honeywell. To this report complainant filed ninety objections. They were overruled and ordered to stand as exceptions. An interlocutory decree was entered by the court sustaining some of the exceptions and overruling others, and the master was ordered to restate the account in accordance with the decree. Thereafter the master withdrew the accounting part of his report only, and restated it in accordance with the decree. In this restatement complainant was given credit for the amounts expended by him prior to the date of the contract, as well as afterwards, but the defendants were not given credit for any sum paid prior to the contract, but only that which was paid out subsequent to it. To

this supplemental report defendants filed objections. They were overruled and ordered to stand as exceptions which were likewise overruled and a decree entered. The master in his supplemental report stated: "I understand the said order of the Court to direct the Master to make the computation stated above and not consider the merits of the case."

The decree is manifestly unjust and inequitable; in fact, it is not sought to be defended in this court on either of these grounds. There can be no equitable reason why complainant in the accounting should be allowed for the amount he had expended prior to the execution of the contract and the defendants Tregor and Karelnot be given credit for the amount expended by them prior to the contract. In fact, it is not even suggested by counsel for complainant, nor could it well be, that the decree is just or equitable. It is sought to be justified apparently only on the ground that no objection was filed by defendants to the masters report that such credit was not given them in the first account. As the master's first report did not take into account any money expended prior to the contract, and as the result was in favor of the defendants and against complainant, there was no need to file objections, and it was only after the master gave credit, as he was directed, to complainant and did not give credit to defendants for the amounts expended prior to the contract, that they had an opportunity to file objections. It appears from the evidence that the St. Helen's Company was incorporated for \$1,000,000, and the Pacific Power & Railway Company for \$2,000,000; that neither of them had any assets, except a tentative claim for some prospective

this supplemental report defendants filed objections. They were overruled and ordered to stand as exceptions which were likewise overruled and a decree entered. The master in his supplemental report stated: "I understand the will order of the Court to direct the Master to make the computation stated above and not consider the merits of the case."

The decree is manifestly unjust and inequitable; in fact, it is not sound to be defended in this court on either of these grounds. There can be no equitable reason why complainant in the accounting should be allowed for the amount he had expended prior to the execution of the contract and the defendants' Treasury and should not be given credit for the amount expended by them prior to the contract. In fact, it is not even suggested by counsel for complainant, nor could it well be, that the decree is just or equitable. It is sought to be justified apparently only on the ground that no objection was filed by defendants to the master's report that such credit was not given them in the first account. As the master's first report did not take into account any money expended prior to the contract, and as the result was in favor of the defendants and against complainant, there was no need to file objections, and it was only after the master gave credit, as he was directed, to complainant and did not give credit to defendants for the amounts expended prior to the contract, that they had an opportunity to file objections. It appears from the evidence that the St. Louis & New Orleans Railway Company was incorporated for \$1,000,000, and the Pacific Power & Light Company for \$2,000,000; that neither of them had any assets, except a tentative claim for some prospective

water power, which claim was afterwards canceled by the National Government; that the expenditure of money prior to the contract was made by the three parties on behalf of the St. Helen's Company, and whatever claim these three parties had was against the St. Helen's Company, and neither had a claim for such expenditures against the other; that moneys expended subsequent to the date of the contract was expended by the several parties on behalf of the two corporations, and that neither of the parties would have a claim against any other of the parties, unless by virtue of the contract. Earel, Trego, Honeywell, Jones and Sturtevant, all testified that prior to and at the time of the execution of the first contract, it was expressly understood and agreed that the contract should not become effective and binding, until and unless ten persons were secured who would join in the contract. This is denied by complainant, who testified that no such statement was made, but that it was understood by all of the parties that the contract would be effective as stated by its terms upon its delivery. It is conceded by all parties that the second contract, which was signed by all parties to this litigation, did not become effective, and was not to become effective until at least ten members had executed it. The two contracts are almost identical, except that two provisions of the first contract with reference to the exchange of the stock of the two companies and the voting by the trustee under his power of attorney for certain individuals were eliminated from the second contract. The provisions in each contract in reference to obtaining members are substantially the same. There is other evidence in the record that tends to support defendants' theory that the contract was not in-

water power, which claim was afterwards conveyed by the National Government; that the expenditure of money prior to the contract was made by the three parties on behalf of the St. Helen's Company, and whatever claim there three parties had was against the St. Helen's Company, and neither had a claim for such expenditures against the other; that money expended subsequent to the date of the contract was expended by the several parties on behalf of the two corporations, and that neither of the parties would have a claim against any other of the parties, unless by virtue of the contract. Earl, Tracy, Honeywell, Jones and Brewster, all testified that prior to and at the time of the execution of the first contract, it was expressly understood and agreed that the contract should not become effective and binding, until and unless ten persons were secured who would join in the contract. This is denied by complainant, who testified that no such statement was made, but that it was understood by all of the parties that the contract would be effective as stated by its terms upon its delivery. It is conceded by all parties that the second contract, which was signed by all parties to this litigation, did not become effective, and was not to become effective until at least ten members had executed it. The two contracts are almost identical, except that two provisions of the first contract with reference to the exchange of the stock of the two companies and the voting by the trustees under the power of attorney for certain individuals were eliminated from the second contract. The provisions in each contract in reference to obtaining members are substantially the same. There is other evidence in the record that tends to support defendant's theory that the contract was not in-

tended to be effective until additional parties had been secured. The complainant Beall and the defendants, Karel, Trego and Honeywell are related to each other, while Jones and Sturtevant are not. We think it clear that it was not the intention that Jones should be held under the contract, for it appears that the day after it was signed the other parties to it provided for the payment of interest on the sums that had theretofore been paid. This agreement was not signed by Jones, and there is other evidence in the case that clearly shows that Jones was not considered as being bound. After a most careful consideration of all the evidence in the record, we are of the opinion that the finding of the master that the contract was to be in full force and effect from its date is not sustained, but that such finding is manifestly against the weight of the evidence. Whether a contract is delivered so as to become a binding obligation is a question of intent. We hold that the intention of the parties was that it should not be binding until additional persons had executed it; that as there was a failure in this regard, the contract never was in force and effect. Other allegations of the bill were in no manner proved by the evidence. Complainant's entire case and his right to recover is based upon the contract, and the finding of the master and the decree can only be sustained on the theory that the contract became effective at the time it was executed, although thereafter abandoned, and since we have held that the contract was never in effect, the decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to dismiss the bill for want of equity. As this is a chancery proceeding we can apportion the costs. We think the costs in this and

tended to be effective until additional parties had been secured. The complainant Healy and the defendant, Trego and Moneywell are related to each other, while Jones and Hurtivant are not. We think it clear that it was not the intention that Jones should be held under the contract, for it appears that the day after it was signed the other parties to it provided for the payment of interest on the sums that had theretofore been paid. This agreement was not signed by Jones, and there is other evidence in the case that clearly shows that Jones was not considered as being bound. After a most careful consideration of all the evidence in the record, we are of the opinion that the finding of the master that the contract was to be in full force and effect from its date is not sustained, but that such finding is manifestly against the weight of the evidence. Whether a contract is delivered so as to become a binding obligation is a question of intent. We hold that the intention of the parties was that it should not be binding until additional persons had executed it; that as there was a failure in this regard, the contract never was in force and effect. Other allegations of the bill were in no manner proved by the evidence. Complainant's entire case and his right to recover is based upon the contract, and the finding of the master and the decree can only be sustained on the theory that the contract became effective at the time it was executed, although thereafter abandoned, and since we have held that the contract was never in effect, the decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to dismiss the bill for want of equity. As this is a summary proceeding we can

the trial court should be equally apportioned between the complainant and the defendants Trego, Earel and Honeywell, each paying one-fourth thereof, and it is so ordered.

REVERSED AND REMANDED
WITH DIRECTIONS.

the first cause should be carefully explained
between the complainant and the defendant first,
Israel and Konyakoff, who are living and living
together, and it is in order.

REVEREND AND RESPECTED
WITH DISTINCTION.

341 - 23686

ANTON J. CERMAK, Bailiff etc.,
for use of Robert Eckhardt,

Appellees,

vs.

CHICAGO BONDING & SURETY COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 337

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

This is a suit brought on a replevin bond.
The case was tried before the court without a jury;
there was a finding and judgment in favor of plain-
tiff for \$95.91, to reverse which defendant prosecutes
this appeal.

The facts are agreed, and the only point
urged for reversal is that the judgment entered in the
replevin suit in which the bond was given was insuffi-
cient to support an action on the bond. The judgment
is as follows:

"The court finds the right of possession
of property in the plaintiff in replevin, but
held by the defendant for the payment of \$34.71.
It is therefore ordered that judgment on finding
be entered in the alternative; that plaintiff pay
the defendant \$34.71 in twenty days, or that a
writ of retorno habendo issue for the property
replevied, costs adjudged against the plaintiff."

The argument is that this judgment is insuffi-
cient because it finds the right of possession of the
property in plaintiff instead of the defendant. Section
22 of the replevin act provides that "if the property

ANTON J. CERNAK, Plaintiff etc.,
for use of Robert McDonald,

Appellees,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

vs.

CHICAGO BONDING & SURETY COMPANY,

Appellant.

211 A. 387

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

This is a suit brought on a replevin bond.

The case was tried before the court without a jury;

there was a finding and judgment in favor of plain-

tiff for \$25.91, to reverse which defendant prosecuted

this appeal.

The facts are agreed, and the only point

urged for reversal is that the judgment entered in the

replevin suit in which the bond was given was invalid-

ent to support an action on the bond. The judgment

is as follows:

"The court finds the right of possession
of property in the plaintiff in replevin, but
held by the defendant for the payment of \$24.71.
It is therefore ordered that judgment on finding
be entered in the alternative; that plaintiff pay
the defendant \$24.71 in twenty days, or that
writ of retorno habendo issue for the property
replevied, costs adjudged against the plaintiff."

The argument is that this judgment is invalid-

ent because it finds the right of possession of the

property in plaintiff instead of the defendant. Section

22 of the replevin act provides that "if the property

was held for the payment of any money the judgment may be in the alternative that plaintiff pay the amount for which the same was rightfully held with proper damages within a given time, or make return of the property."

While the judgment of the court might be better expressed than it is, yet we think it is a sufficient compliance with section 22. It in effect holds that the property was held by the defendant in replevin for the payment of money, and it was ordered that unless the amount for which it was so held be paid within twenty days, the property be returned. This is all that the statute requires, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

was held for the payment of any money the judgment may be in the alternative that plaintiff pay the amount for which the same was rightfully held with proper damages within a given time, or make return of the property." While the judgment of the court might be better expressed than it is, yet we think it is a sufficient compliance with section 28. It is effect holds that the property was held by the defendant in replevin for the payment of money, and it was ordered that unless the amount for which it was so held be paid within twenty days, the property be returned. This is all that the statute requires, and the judgment of the Municipal Court of Chicago is affirmed.

APPROVED.

THEODORE F. BRINCKMANN,
Appellant.

vs.

REUBEN H. DONNELLEY,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

211 I.A. 347

MR. JUSTICE O'CONNOR delivered the opinion of the
court.

This appeal involves the other member of the same
firm that is involved in the case of Vondrak v. Donnelley,
Gen. No. 23734. The facts being identical, the opinion
filed this day in the Vondrak case is controlling here.

The judgment of the Circuit Court of Cook County
is therefore affirmed.

AFFIRMED.

THEODORE F. BRINKMANN
Appellant.

vs.

REUBEN H. DONNELLEY,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

211 I.A. 347

MR. JUSTICE O'CONNOR delivered the opinion of the

court.

This appeal involves the other member of the same firm that is involved in the case of Vandrick v. Donnelley, Gen. No. 33734. The facts being identical, the opinion filed this day in the Vandrick case is controlling here. The judgment of the Circuit Court of Cook County is therefore affirmed.

ATTEST.

250 - 23595

AUTO UTILITIES MANUFACTURING
COMPANY, a corporation,

Appellee,

vs.

U. S. BLOW PIPE and DUST COL-
LECTING COMPANY, a corporation,

Appellant.)

211 I.A. 355

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

The Auto Utilities Manufacturing Company, appellee, hereinafter referred to as the plaintiff, brought this action in the Municipal Court of Chicago against the U. S. Blow Pipe and Dust Collecting Company, hereinafter referred to as the defendant, claiming a commission on a contract entered into between the defendant and the National Malleable Casting Company. The plaintiff recovered a judgment amounting to \$120.75, from which the defendant has appealed.

The plaintiff was engaged in installing certain ventilators and stacks in the plant of the Malleable Casting Company as a part of a ventilating system. There were some hoods needed in connection with this work. Mr. Becker of the plaintiff company conferred with Mr. Hahn of the defendant company, and asked him to figure on these hoods and submit his bid to the Malleable Casting Company. Becker says he told Hahn, "in figuring the job, to figure five per cent for me in compensation for what I had done on the job.

STILL A. 355

WHITE UTILITIES MANUFACTURING COMPANY, a corporation,

Appellee,

ATTORNEY AT LAW
MUNICIPAL COURT
OF CHICAGO.

U. S. BLOW PIPE AND TEST CO.,
LITONING COMPANY, a corporation,

Appellant.

MR. JUSTICE THOMAS delivered the opinion of the

court.

The Auto Utilization Manufacturing Company, appellee, hereinafter referred to as the plaintiff, brought this action in the Municipal Court of Chicago against the U. S. Blow Pipe and Test Collecting Company, hereinafter referred to as the defendant, claiming a commission on a contract entered into between the defendant and the National Reliable Gas Company. The plaintiff recovered a judgment amounting to \$120.75, from which the defendant has appealed.

The plaintiff was engaged in installing certain ventilators and stacks in the plant of the National Reliable Gas Company as a part of a ventilating system. There were some goods needed in connection with this work. Mr. Becker of the plaintiff company conferred with Mr. Hahn of the defendant company, and asked him to figure on these goods and submit his bid to the National Reliable Gas Company. Becker says he told Hahn, "in figuring the job, to figure five per cent for me in compensation for what I had done on the job."

He said he would." The defendant company ultimately closed the contract with the Malleable Casting Company covering the hoods in question, the amount involved being \$2415.00. The plaintiff's claim is based on five per cent of that amount, which is \$120.75. The nature of the plaintiff's claim is best expressed in the language used by them in a letter addressed to the defendant under date of May 4, 1917, in which we find this language: "this company furnished its services to you in securing an order amounting to \$2600.00 or \$2700.00 from the Malleable Casting Company and the agreed commission to be paid us by their Mr. Hahn was five per cent."

The defendant urges that the judgment should be reversed because the making of any contract involving services, on its part to secure an order or contract for the defendant in consideration of the payment of a commission to it by the defendant, was a matter beyond the scope of the business of the plaintiff as defined in its charter and therefore ultra vires. It appears from the record that the corporate powers of the plaintiff as authorized by its charter were ["to manufacture, buy, sell, use, and deal in automobile specialties; to manufacture, buy, sell, use, and deal in and with, machines, goods, wares, and merchandise of all kinds; to purchase, sell, lease and deal in inventions, patents, and processes, and in connection with its business of manufacturing, buying, selling, using, dealing in and with machines, goods, wares, and merchandise, patents, inventions, and processes, to construct, build, lease, own, and operate all necessary factories, shops, buildings and plants,"]

He said he would. The defendant company immediately closed the contract with the Hallsdale Casting Company covering the molds in question, the amount involved being \$215.00. The plaintiff's claim is based on five per cent of that amount, which is \$10.75. The nature of the plaintiff's claim is best expressed in the language used by them in a letter addressed to the defendant under date of May 4, 1917, in which we find this language: "this company furnished its services to you in securing an order amounting to \$2500.00 or \$2700.00 from the Hallsdale Casting Company and the agreed commission to be paid us by their Mr. Kahn was five per cent."

The defendant urges that the judgment should be reversed because the making of any contract involving services, on the part to secure an order or contract for the defendant in consideration of the payment of a commission to it by the defendant, was a matter beyond the scope of the business of the plaintiff as defined in its charter and therefore ultra vires. It appears from the record that the corporate powers of the plaintiff as authorized by its charter were "to manufacture, buy, sell, use, and deal in automobile specialties; to manufacture, buy, sell, use, and deal in and with machines, goods, wares, and merchandise of all kinds; to purchase, sell, lease and deal in inventions, patents, and processes, and in connection with its business of manufacturing, buying, selling, using, dealing in and with machines, goods, wares, and merchandise, patents, inventions, and processes, to construct, build, lease, own, and operate all necessary factories, shops, buildings and plants."

In meeting this contention advanced by the defendant, the plaintiff argues that it was within its charter powers to install the ventilating system in question, nor would it have been beyond its charter powers if it had installed the hoods used in connection with that system, and that if the plaintiff had the right to install the ventilating system, then as incidental to such power, it had the right to sublet any part of the work. This, no doubt, is true, but it fails to meet the defendant's contention. The plaintiff did not sublet the contract for the hoods, but the defendant made an independent contract direct with the National Malleable Casting Company to furnish the hoods, and the plaintiff's claim, as distinctly stated in their letter from which we have quoted is that they are claiming a commission for services rendered in procuring that contract for the defendant, and that is the theory of the statement of claim filed herein. In our opinion, the charter ^{the} powers of the ^{corporation} plaintiff as we have quoted them, are not such as to permit it to collect commissions for services rendered in procuring contracts for others, even though those contracts, involve such a subject-matter as would bring the contract within the ^{corporation's} plaintiff's charter powers if it was making the contract itself, and even though the contract on which the commission is claimed, has been made in conjunction with and incident to, a separate and distinct contract had by the ^{corporation} plaintiff with the same party with which the other contract has been made.]

We do not deem it necessary to discuss the other points urged by the appellant. For the reasons given, the judgment of the Municipal Court will be reversed.

REVERSED.

In meeting this contention advanced by the defendant, the plaintiff argues that it was within its charter powers to install the ventilating system in question, nor could it have been beyond its charter powers if it had installed the hood as in connection with that system, and that if the plaintiff had the right to install the ventilating system, then as incidental to such power, it had the right to submit any part of the work. This, no doubt, is true, but it fails to meet the defendant's contention. The plaintiff did not submit the contract for the hood, but the defendant made an independent contract direct with the National Machine Tooling Company to furnish the hood, and the plaintiff's claim, as distinctly stated in their letter from which we have quoted is that they are claiming a commission for services rendered in procuring that contract for the defendant, and that is the theory of the statement of claim filed herein. In our opinion, the charter powers of the plaintiff as we have quoted them, are not such as to permit it to collect commissions for services rendered in procuring contracts for others, even though those contracts, involving a subject-matter as would bring the contract within the plaintiff's charter powers if it was making the contract itself, and even though the contract on which the commission is claimed, has been made in conjunction with and incident to, a separate and distinct contract and by the plaintiff with the same party with which the other contract has been made.

We do not deem it necessary to discuss the other points urged by the appellant. For the reasons given, the judgment of the municipal court will be reversed.

PAUL BRAUTIGAN, Administrator
of the Estate of Franklin
Brautigan, deceased,
Appellee,

vs.

UNION OVERALL LAUNDRY AND
SUPPLY COMPANY, a Corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

211 I.A. 356

MR. JUSTICE THOMSON delivered the opinion of the court.

In this action, the plaintiff, Paul Brautigan, administrator of the estate of Franklin Brautigan, deceased, recovered a judgment against the defendant, Union Overall Laundry and Supply Company, a corporation, for the sum of \$3,000.00, from which the defendant has appealed. The action was based upon the alleged negligence of an employee of the defendant in driving an automobile truck and striking deceased, knocking him down, and inflicting injuries from which he died.

The deceased and his sons were engaged with others in work involving the laying of water mains by the City of Chicago, in 48th Avenue. Late in the afternoon of July 3, 1914 when they quit work, Daniel Brautigan, the son of the deceased, aged about thirteen years, was driving a team of horses and two dump wagons, one hitched behind the other, north in 48th Avenue. There was a double street car track in that street which was paved with stone blocks. The water pipes were being laid in the east road-way, the west road-way which had never been paved, seems to have been unusable, although the evidence on that point is conflicting. Daniel was driving in the north-bound track, and his father, the deceased, was following on foot just behind the rear wagon. There was a shanty on the west side of 48th Avenue at the south side of Wrightwood Avenue. When about one hundred feet south of that shanty, Daniel started to pull over toward it, and as he had his team diagonally across the south-bound track, he saw

1871

an automobile truck coming down from the north in the south-bound track. He slowed up his team. The truck swung over into the east, or north-bound track, whereupon Daniel hurried up his team so that his wagons would be clear of the path the automobile had taken. The truck was running, apparently, with left wheels between the two rails of the north-bound track, and right wheels between the two tracks, as it passed close to the rear of the rear wagon. It appears from the testimony that the right front corner of the truck caught the deceased and knocked him down. When the truck stopped, the plaintiff's witnesses say the deceased was lying about twenty-five feet behind it, and the defendant's witnesses say this distance was not over seven or eight feet. There was much conflict in the evidence as to the speed of the truck. The plaintiff's witnesses put it at twenty to twenty-five miles an hour, but most of them are shown to have testified at the coroner's inquest, the day after the accident, and to have stated at that time that it was traveling "pretty fast" or at "good speed," and to have said they could not give the speed in miles per hour. There was a back-filling apparatus working on the ditch about three hundred feet north of the point where the deceased was struck. In connection with this, there was a cable extending across the tracks. The man operating this apparatus, testified that he put his foot on the cable to hold it down as the truck passed, that it was coming full speed, and that he yelled at the chauffeur as he passed, to slow down. The chauffeur testified that he was not going over ten or twelve miles an hour at this point, and that when he struck deceased, he was not going over four or five miles per hour. He further testified that he first saw the deceased when thirty or thirty-five feet away from him. Later, he testified that he could stop his truck in three or four feet when going ten or twelve miles per hour. He also

says he applied his brakes as soon as he saw deceased but that the pavement was wet and he skidded. All the testimony given by the plaintiff's witness was to the effect that the pavement was dry. Based on the defendant's evidence that the deceased was lying seven or eight feet behind the truck when it stopped, the truck covered a distance of thirty-eight to forty-three feet plus the length of the truck, from the time the brakes were applied until it came to a stop. On the defendant's own evidence, therefore, the truck must have been going very fast, whether the pavement be taken as wet or dry. The chauffeur further testified that the wagons obstructed his view of the deceased until he was within thirty or thirty-five feet of him. No horn was blown or other signal given. When the deceased came in view, one Robinson, riding with the chauffeur, called loudly, but the warning was not in time to save him. When the chauffeur undertook to pass close to these wagons on the left, or wrong side, it became his duty to exercise far more care than he did in doing so, and this without regard to the condition of the west roadway. We find no evidence in the record justifying defendant's contention that the deceased was guilty of contributory negligence. Defendant seems to contend that Daniel was negligent in driving over on to the south-bound track when the truck was approaching on that track from the north. In our opinion, the evidence does not disclose such a situation as would make that action on his part, negligence, and even if it did, that negligence could not be charged to the deceased. The verdict is supported by the evidence.

The defendant urges a number of alleged errors in regard to the admission of evidence. Most of these rulings were correct. A few of them might be considered erroneous, but they were on trivial matters which in no way prejudiced the defendant's case. They are not important enough to refer

[illegible]

to here.

It is further alleged by the defendant that the court erred in giving the following instruction:

"You are further instructed that/in an action brought to recover damages either to the person or property caused by running an automobile propelled by mechanical power along a public street through a residential portion of an incorporated city at a greater rate of speed than fifteen miles an hour, the plaintiff is deemed to have made out a prima facie case of negligence by showing the fact that the deceased was killed by said automobile and that the person running such automobile was at the time of the injury running the same at a rate of speed greater than the law permits."

This was a good instruction (Kessler vs. Washburn 157 Ill. App. 532; Ward vs. Meredith 230 Ill. 66; Hartje vs. Moxley 235 Ill. 164) and the court did not err in giving it unless the evidence failed to show that the place of the accident was within an incorporated city and in a residence district. Although it might be said that what little evidence there was on that point, hardly supported the contention that it was a residence district, in which case, the instruction should not have been given, the error was in no way prejudicial to the defendant. The instruction merely told the jury that under given circumstance the plaintiff would be deemed to have made out a prima facie case of negligence. Assuming that the given circumstances in fact were not present, it remains that the evidence did make out, in other respects, a prima facie case of negligence and more.

The defendant further complains of the following instruction:

"The court instructs the jury that if you believe from the evidence that Franklin Brautigan while in the exercise of ordinary care for his safety and without fault or negligence on his part lost his life by and through the negligence of the defendant, as charged in the declaration or in either count thereof, as amended, and that said Franklin Brautigan left him surviving next of kin, then you should find the defendant guilty and assess the plaintiff's damages at such sum as you believe from the evidence will be fair and just compensation based upon the pecuniary loss, if any,

to issue

It is further alleged by the defendant that the

were the following investigations:

"The first investigation was made by the
author through the records of the
Bureau of Prisons, which showed that the
defendant had been in the prison for a
period of six months, from the first of
June to the first of December, 1934.
The defendant is known to have been in
the prison during the period of the
first of June to the first of December,
1934, and the defendant was released on
the first of December, 1934, at a point
of time when the prison was in a state
of confusion."

This was a local investigation (Bureau of Prisons)

The first investigation was made by the

author through the records of the

defendant's record in the prison of the defendant was

shown as imprisonment and in a certain district.

Although it is not to be said that the defendant

is not a person, it is not to be said that it was a

person, it is not to be said that it was a

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resulting from the death of the said Franklin Brautigan to his said next of kin, not exceeding the sum of ten thousand (\$10,000) dollars."

It would have been more accurate if this instruction had included the phrase "and under the instructions of the court" but this omission cannot be considered reversible error. Similar instructions have been approved by our Supreme Court. Q. B. & Q. R. R. Co. vs. Payne, Administrator 59 Ill. 541; I. & St. L. R. R. Co. vs. Estes 96 Ill. 470; Calumet Street Ry. Co. vs. Van Pelt 173 Ill. 70, in the latter case, the court said, at page 75, in answer to the contention that the instruction was erroneous in that the suggestion to the jury that if they found the appellant guilty they should assess damages not exceeding the sum claimed in the declaration, "the law limits the liability of the defendant in such case, and in all cases the recovery is limited to the amount of the ad damnum of the declaration, and it can not be error to so advise a jury unless the language employed be such as to suggest or imply that the jury should or would be authorized to assess the full amount of the damage claimed in the declaration or permitted by law to be recovered in the case. This instruction does not offend in that respect * * * * *". Moreover, the judgment here is not large and apparently the defendant was in no way injured by the instruction in question.

It is also contended that the trial court erred in giving the following instruction:

"The court instructs the jury that a driver of an automobile while using the highway must use reasonable care to avoid injury to others."

This was a proper instruction in view of the evidence in the record and when considered in connection with the other instructions given by the court. It did not direct a verdict and therefore excluded no element necessary for the plaintiff to prove in order to recover, nor did it eliminate such defenses as the defendant was urging.

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and the authors are grateful to the referees for their constructive comments.

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we are indebted to the following:

The defendant also assigns as error, the refusal of the court to give the jury an instruction which it submitted. The substance of this instruction was embraced in other instructions which the court did give.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

[illegible]

280 - 23625

HARRY HOMEWOOD,

Appellee,

vs.

MYER J. STEIN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 359

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment by confession entered in the Municipal Court of Chicago in an action brought by Harry Homewood, the plaintiff, on a lease in which he was the lessor, and the defendant, Myer J. Stein, was the lessee. By the terms of the lease, the lessor leased an apartment for the term beginning October 1, 1912 and ending September 30, 1913, at a rental of \$36.50. The lease contained the following clause: "the lessee hereby constitutes and appoints any attorney of any court of record to be his true and lawful attorney for him and in his name and stead to enter his appearance in any and every suit that may be brought in any of the courts of record in the State of Illinois, and also in any and every suit that may be brought in any court of record in any of the States of the United States of America at any time, and from time to time, whether in term or vacation, when any money is due hereunder for rent as aforesaid, to waive service of process and also the issue of process, and to waive trial, and to

211 A. 359

MUNICIPAL COURT
OF CHICAGO

APPEAL FROM

Appellant.

MYER J. STEIN,

vs.

Appellee,

HARRY HOMERWOOD,

230 - 23286

MR. JUSTICE THOMSON delivered the opinion of

the court.

This is an appeal from a judgment by confession

entered in the Municipal Court of Chicago in an action brought by Harry Homerwood, the plaintiff, on a lease in which he was the lessor, and the defendant, Myer J. Stein, was the lessee. By the terms of the lease, the lessor leased an apartment for the term beginning October 1, 1912 and ending September 30, 1913, at a rental of \$26.50. The lease contained the following clause: "the lessee hereby

constitutes and appoints any attorney of any court of record to be his true and lawful attorney for him and in his name and stead to enter his appearance in any and every suit that may be brought in any of the courts of record in the State of Illinois, and also in any and every suit that may be brought in any court of record in any of the States of the United States of America at any time, and from time to time, whether in term or vacation, when any money is due hereunder for rent or interest, to waive service of process and also the issue of process, and to waive trial, and to

confess judgment for such money so due, and for costs of suit and for twenty-five dollars attorney's fees in favor of the said lessor or any subsequent legal holder or holders of the rights of the lessor under this lease and to release all errors that may occur or intervene in such proceedings, and to stipulate that no writ of error or appeal shall be prosecuted from such judgment, nor any bill in equity filed, nor any proceeding of any kind taken at law, nor any equity to interfere in any way with the collection of such judgment and to consent that execution may issue thereon immediately; and also to file a cognovit for such money, costs, and fees with an agreement therein waiving, releasing and stipulating as aforesaid." This action was begun by the filing of statement of claim and cognovit, March 16, 1917. George C. Otto appearing as attorney for the plaintiff. In the cognovit, Charles O. Shervey appears as the defendant's attorney. The statement of claim was for a month's rent amounting to \$36.50, the month in question being the last one of the term. Judgment was entered for that amount and \$25.00 attorney's fees, making a total of \$61.50. On March 24, the defendant entered his appearance and prayed an appeal to this court, which was allowed.

In urging a reversal of the judgment, the defendant refers to certain alleged facts which are not shown by the record and which we, therefore, can not take into consideration. In the brief filed, the defendant concedes that our courts have held valid under Section 83, Chapter 69 of the Illinois statutes, a power or warrant of attorney to confess judgment for accruing unpaid rent. That is just what this power of attorney here involved is, and

confess judgment for such money to me, and for costs of suit and for twenty-five dollars attorney's fees in favor of the said lessor or any subsequent legal holder or holders of the rights of the lessor under this lease and to release all errors that may occur or intervene in such proceedings, and to stipulate that no writ of error or appeal shall be prosecuted from such judgment, nor any bill in equity filed, nor any proceeding of any kind taken at law, nor any equity to interfere in any way with the collection of such judgment and to consent that execution may issue thereon immediately; and also to file a cognovit for such money, costs, and fees with an agreement therein waiving, releasing and stipulating as follows: "This action was begun by the filing of a statement of claim and cognovit, March 16, 1917. George O. Otto appearing as attorney for the plaintiff. In the cognovit, Charles O. Shervoy appears as the defendant's attorney. The statement of claim was for a month's rent amounting to \$6.50, the month in question being the last one of the term. Judgment was entered for that amount and \$25.00 attorney's fees, making a total of \$31.50. On March 24, the defendant entered his appearance and prayed an appeal to this court, which was allowed.

In giving a reversal of the judgment, the defendant refers to certain alleged facts which are not shown by the record and which he, therefore, can not take into consideration. In the brief filed, the defendant concedes that our courts have held valid under Section 80, Chapter 80 of the Illinois statutes, a power of attorney of attorney to confess judgment on accruing unpaid rent. That is just what this power of attorney here involved is, and

nothing more. At least, that is the extent to which this power was exercised in this case. Defendant can not complain about that part of the power, waiving, among other things, the right to appeal, whether or not that part is valid, because he is now enjoying that right without any attempt at interference by the plaintiff. The defendant urges that the court erred in including the amount of twenty-five dollars in the judgment as attorney's fees which, he urges, is out of proportion to the amount of the judgment. It is somewhat, but that is due, not so much to the size of the fee as to the small amount of rent that was due. The fee of twenty-five dollars was specified in the power of attorney and that can^{not}/be considered an unreasonable fee for going into court and confessing judgment under such power, even where the amount confessed to be due is not large. On this point counsel cites the case of Campbell v. Goddard, 117 Ill. 251, which is not in point, for the power of attorney there involved, provided for a "reasonable attorney's fee". Where the power of attorney specifies the amount to be allowed as attorney's fees, it will not be error to allow the amount so specified, unless it is clearly unreasonable, which can not be said of the amount allowed in this case.

The defendant urges upon our consideration the case of Little v. Dyer, 138 Ill. 272, which also is not in point. The judgment of the trial court is clearly supported by authorities and among them Agnew v. Sexton, 86 Ill. App. 274; Fortune v. Bartolomei, 164 Ill. 51; Bowman v. Powell, 127 Ill. App. 114. The power in the case at bar was exercised within its limitations and judgment was entered for a certain

nothing more. At least, that is the extent to which this power was exercised in this case. Defendant can not complain about that part of the power, waving, among other things, the right to appeal, whether or not that part is valid, because he is now enjoying that right without any attempt at interference by the plaintiff. The defendant urges that the court error in including the amount of twenty-five dollars in the judgment as attorney's fees which, he urges, is out of proportion to the amount of the judgment. It is somewhat, but that is due, not so much to the size of the fee as to the small amount of rent that was due. The fee of twenty-five dollars was specified in the power of attorney and that can be considered an unreasonable fee for going into court and considering judgment under such power, even where the amount confessed to be due is not large. On this point counsel cites the case of Hamrell v. Giddard, 114 Ill. 251, which is not in point, for the power of attorney there involved, provided for a "reasonable attorney's fee". Where the power of attorney specifies the amount to be allowed as attorney's fees, it will not be error to allow the amount so specified, unless it is clearly unreasonable, which can not be said of the amount allowed in this case.

The defendant urges upon our consideration the case of Little v. Ver, 133 Ill. 272, which also is not in point. The judgment of the trial court is clearly supported by authorities and more recent cases Green v. Weston, 86 Ill. App. 274; Portman v. Bartolomei, 104 Ill. 51; McGowan v. Powell, 129 Ill. App. 114. The power in the case at bar was exercised within its limitations and judgment was entered for a certain

and liquidated sum, namely, one month's rent at the monthly rental specified in the lease.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

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rental specified in the lease.

There being no error in the record, the judgment
of the Municipal Court is affirmed.

APPROVED.

346 - 23691

OTTO SCHMIDT, Executor of the
Estate of Rebecca Schmidt,
deceased,

Appellant,

vs.

SAMUEL C. PIRIE et al,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 367

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an action in replevin brought by the
plaintiff, Otto Schmidt, executor of the Estate of
Rebecca Schmidt, deceased, against Carson, Pirie, Scott
& Co. to recover certain furs. After suit was started,
Simon Hausman, Henrietta Hausman, Samuel Lederer, and
Lena Lederer, hereinafter referred to as the defendants
were made parties to the suit as intervening defendants
on motion of Carson, Pirie, Scott & Co. A trial was
had before the court without a jury, as a result of which
the court found that the right to the possession of the
property replevied was not in the plaintiff and awarded
a writ of return. *From this judgment plaintiff appeals*

The deceased, Rebecca Schmidt, died in January
1916, at which time, the members of her immediate family
were the plaintiff, her husband, three sons, and two
daughters, the latter being the two defendants, Henrietta
Hausman and Lena Lederer, the other two defendants being
the husbands of those two daughters. The deceased left
a will, by the terms of which, the plaintiff was her sole

OTTO SCHMIDT, Executor of the
Estate of Rebecca Schmidt,
deceased,

Appellant,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

vs.

SAULMAN, PIRIE & CO.,

Appellees.

2111 A. 367

MR. JUSTICE THOMSON delivered the opinion of

the court.

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plaintiff, Otto Schmidt, executor of the estate of

Rebecca Schmidt, deceased, against Carson, Pirie, Scott
& Co. to recover certain furs. After suit was started,

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had before the court without a jury, as a result of which

the court found that the right to the possession of the

property replevied was not in the plaintiff and awarded

a writ of replevin.

The deceased, Rebecca Schmidt, died in January

1916, at which time, the members of her immediate family

were the plaintiff, her husband, three sons, and two

daughters, the latter being the two defendants, Henrietta

Hausman and Lena Lederer, the other two defendants being

the husbands of those two daughters. The deceased left

a will, by the terms of which, the plaintiff was her sole

beneficiary. The furs in question constituted a part of the personal estate and were taken into possession by the plaintiff. Some time later, these furs were stored with Carson, Pirie, Scott & Co. who gave receipts for them running to "Mr. Otto Schmidt and Mr. S. Hausman." It is not clear from the evidence just who turned the furs over to Carson, Pirie, Scott & Co. and received receipts therefor. The plaintiff testified that he told his daughter, Mrs. Hausman, to store them with Carson, Pirie, Scott & Co. Mrs. Hausman testifies that she thereupon telephoned, or had some one else telephone to Carson, Pirie Scott & Co., and they sent a man out to the home of Otto Schmidt where Mrs. Hausman seems to have been staying and the furs were delivered to the messenger and a receipt or card was given for them by the messenger. She states further she did not know who got the receipts until they were handed over to her by her father. The evidence further discloses that on several occasions, the plaintiff expressed the intention of giving the furs to his two daughters and that some time later, he handed the receipts for the furs to his daughter, Mrs. Hausman in the presence of the other daughter, Mrs. Lederer saying "Henrietta, I want you to take these receipts and divide the furs with your sister." Mrs. Hausman, says that this was the first time she had personally seen the receipts. Mrs. Lederer also testified to this conversation and the evidence shows that on a number of occasions subsequent to this, the plaintiff stated that he had given the furs to the two girls, giving his reasons for doing so. It seems the daughters never removed the furs from Carson, Pirie, Scott & Co. nor attempted to do so, but on one occasion, one or both of them, went to the store of Carson. Pirie, Scott & Co. and tried

beneficiary. The furs in question constituted a part of the personal estate and were taken into possession by the plain- till. Some time later, these furs were stored with Carson, Pirie, Scott & Co. who gave receipts for them running to "Mr. Otto Schmidt and Mr. S. Hausman." It is not clear from the evidence just who turned the furs over to Carson, Pirie, Scott & Co. and received receipts therefor. The plaintiff testified that he told his daughter, Mrs. Hausman, to store them with Carson, Pirie, Scott & Co. Mr. Hausman testifies that she thereupon telephoned, or had some one else telephone to Carson, Pirie, Scott & Co., and they sent a man out to the home of Otto Schmidt where Mrs. Hausman seems to have been staying, and the furs were delivered to the messen- ger and a receipt or card was given for them by the messen- ger. She states further she did not know who got the re- cepts until they were handed over to her by her father. The evidence further discloses that on several occasions, the plaintiff expressed the intention of giving the furs to his two daughters and that some time later, he handed the receipts for the furs to his daughter, Mrs. Hausman in the presence of the other daughter, Mrs. Lederer saying "Remember I want you to take these receipts and divide the furs with your sister." Mrs. Hausman says that this was the first time she had personally seen the receipts. Mrs. Lederer also testified to this conversation and the evidence shows that on a number of occasions subsequent to this, the plaintiff stated that he had given the furs to the two girls, giving his reasons for doing so. It seems the daughters never received the furs from Carson, Pirie, Scott & Co. nor attempted to do so, but on one occasion, one or both of them went to the store of Carson, Pirie, Scott & Co. and tried

some of the garments on for the purpose of ascertaining whether repairs or alterations were needed. The plaintiff seems to have had a change of heart some time later on, and he sent one of his sons to Carson, Pirie, Scott & Co. with a written note requesting them to deliver the furs to bearer which they declined to do, whereupon this action was begun. In contending that the judgment of the trial court should be reversed, the plaintiff has called our attention to the case of McCartney v. Ridgway, 160 Ill. 129. That case is not in point for, as the court there says on page 154, the provision which was there before the court for construction was "not a present gift, but a gift which the parties agreed among themselves should be made thereafter." Although the evidence in the case at bar is conflicting and the plaintiff denies a number of things which we have included in the statement of facts recited above, we believe after a careful examination of the record that it conclusively establishes the facts as we have related them. From those facts, it is quite evident that the plaintiff made a valid gift of the furs in question to his two daughters. The evidence is convincingly to the effect that when he handed the receipts for the furs to his daughter, Mrs. Hausman, in the presence of the other daughter, Mrs. Lederer, it was his intention to make an absolute and irrevocable gift of the furs called for by the receipts to them, and further, that it was his intention that the gift was to go into effect immediately. As a result of the gift, the two daughters acquired a joint interest in the furs in question and delivery of the receipts by the plaintiff to one of the daughters was, in effect, a delivery to both of them. East Rutherford

some of the garments on for the purpose of ascertaining whether repairs or alterations were needed. The plaintiff seems to have had a change of heart some time later on, and he sent one of his sons to Carson, Tills, & Co. with a written note requesting them to deliver the fur to better which they declined to do, whereupon this action was begun. In contending that the judgment of the trial court should be reversed, the plaintiff has called our attention to the case of Ruppel v. Ruppel, 189 Ill. 129. That case is not in point for, as the court there says on page 184, the provision which was there before the court for contribution was "not a present-gift, but a gift which the parties agreed among themselves should be made in the future." Although the evidence in the case at bar is conflicting and the plaintiff denies a number of things which we have included in the statement of facts recited above, we believe after a careful examination of the record that it conclusively established the facts as we have related them. From those facts, it is quite evident that the plaintiff made a valid gift of the fur in question to his two daughters. The evidence is convincingly to the effect that when he handed the receipt for the fur to his daughter, Mrs. Hansen, in the presence of the other daughter, Mrs. Reder, it was his intention to make an absolute and irrevocable gift of the fur called for by the receipts to them, and further, that it was his intention that the gift was to take effect immediately. As a result of the gift, the two daughters acquired a joint interest in the fur in question and delivery of the receipts by the plaintiff to one of the daughters was, in effect, a delivery to both of them. West Ruppel

Savings, Loan and Building Association v. McKenzie, 100 Atl. 931. It can not be contended that the plaintiff delivered the receipts to an agent accompanied by an expression on his part that the agent was to divide them between certain intended donees. The delivery of the receipts by the plaintiff was to the donees direct, accompanied by words that did not signify intention to give them the furs at any time in the future, but accompanied by words clearly constituting a present gift.

The receipts in question contained a provision to the effect that "in case of a desired delivery to any person other than the person herein named, a written order signed by the owner must accompany the coupon." The plaintiff contends that inasmuch as the delivery of the receipts was not accompanied by a written order on Carson, Pirie, Scott & Co. to deliver the furs to the one to whom the receipts were given, there was not a valid and irrevocable gift and that the presence of the clause required something further than the giving of the receipts, to be done in order to complete the gift. This contention is not sound. That point might well be urged as between the defendants and Carson, Pirie, Scott & Co., but the presence of such a clause ^{the} in receipts does not prevent the completion of a valid gift between the plaintiff and his daughters, where the evidence discloses such circumstances as conclusively show an intention on the part of the plaintiff at the time of the delivery of the receipts to the daughters to give them the furs in question. There would be a different situation, if at the time the plaintiff gave his daughters

Baynes, John and William v. McLenzie, 100 Atl.
931. It can not be contended that the plaintiff delivered
the receipts to an agent accompanied by an expression on
his part that the agent was to divide them between certain
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tiff contends that inasmuch as the delivery of the receipts
was not accompanied by a written order on Carson, Pirie,
Scott & Co., to deliver the same to the one to whom the
receipts were given, there was not a valid and irrevocable
gift and that the absence of the clause required something
further than the giving of the receipts, to be done in
order to complete the gift. This contention is not sound.
That point might well be argued as between the defendants
and Carson, Pirie, Scott & Co., but the presence of such a
clause in the receipts does not prevent the completion of a
valid gift between the plaintiff and his daughter, where
the evidence discloses such circumstances as conclusively
show an intention on the part of the plaintiff at the time
of the delivery of the receipts to the daughter to give
them the same in question. There would be a different
situation, if at the time the plaintiff gave his daughter

the receipts, he had stated that he wanted them to possess the furs and that some time later, he would give them such a written order as, together with the receipts, would enable them to go to Carson, Pirie, Scott & Co. and get them, but that is not the evidence. It might well be noted that the receipts in question also contained the following clause "Carson, Pirie, Scott & CO. may deliver the articles represented by any or all of the coupons of this receipt according to the direction of any persons presenting said coupons." If the warehouseman chose to be governed by that clause in the receipts, they were, in effect, bearer receipts, but which ever clause is taken as the controlling one, in our opinion the delivery of the receipts by the plaintiff to his daughters, under the circumstances disclosed by the evidence, amounted to a valid gift of the furs by him to them.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

the receipts, he had stated that he wanted them to possess the furs and that some time later, he would give them such a written order as, together with the receipts, would enable them to go to Carson, Pirie, Scott & Co. and get them, but that is not the evidence. It might well be noted that the receipts in question also contained the following clause: "Carson, Pirie, Scott & Co. may deliver the articles represented by any or all of the coupons of this receipt according to the direction of any person presenting said coupons." If the warehouseman chooses to be governed by that clause in the receipt, they were, in effect, bearer receipts, but which ever clause is taken as the controlling one, in our opinion the delivery of the receipts by the plaintiff to his daughter, under the circumstances disclosed by the evidence, amounted to a valid gift of the furs by him to them.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

WHYBURN.

381 - 23726

ROBERT H. TAFT,

Appellant,

vs.

WILLIAM HERLEY,

Appellee.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

211 I.A. 369

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Robert H. Taft, brought this action against the defendant, William Herley, to recover the balance alleged to be due on a sale of forty-two shares of stock in the American Cereal-Coffee Company under a contract entered into by them. The statement of claim alleges that plaintiff's claim is "for balance due for purchase price of forty-two (42) shares of stock at the par value of \$100.00 each in the American Cereal-Coffee Company, a corporation, under the laws of the State of Illinois as follows:

| | |
|---------------------|---------------|
| Purchase price | \$3,600.00 |
| By Cash | 500.00 |
| By Notes (now paid) | <u>500.00</u> |
| BALANCE | \$2,600.00 |

The defendant's affidavit of merits avers that the parties entered into a verbal agreement for the purchase of the stock mentioned in the statement of claim, by which agreement the defendant was to pay \$1,000.00 in cash and notes, and in addition thereto was to convey to the plaintiff certain real estate, and that the agreement fixed no value

ROBERT H. TAYLOR

Appellant,

vs.

WILLIAM HERLEY

Appellee.

MUNICIPAL COURT,

CHICAGO.

211 A 369

the court. Mr. Justice Thompson delivered the opinion of

The plaintiff, Robert H. Taylor, brought this action against the defendant, William Herley, to recover the balance alleged to be due on a sale of forty-two shares of stock in the American Cereal-Coffee Company under a contract entered into by them. The statement of claim alleges that plaintiff's claim is for balance due for purchase price of forty-two (42) shares of stock at the par value of \$100.00 each in the American Cereal-Coffee Company, a corporation, under the laws of the State of Illinois as follows:

| | |
|---------------------|-------------------|
| Purchase price | \$3,800.00 |
| By Cash | 500.00 |
| By Notes (now paid) | <u>800.00</u> |
| BALANCE | \$2,500.00 |

The defendant's affidavit of merits avers that the parties entered into a verbal agreement for the purchase of the stock mentioned in the statement of claim, by which agreement the defendant was to pay \$1,000.00 in cash and notes, and in addition thereto was to convey to the plaintiff cer-

for the real estate, nor was the purchase price of the stock fixed by the agreement. It is also alleged by the defendant in his affidavit of merits that the \$1,000.00 which he has paid, exceeds the value of the stock and that certain representations made by the plaintiff at the time of the agreement, to the effect that it was earning a substantial profit, and that the company in question was in good financial standing, were false. The defendant also sets up the statute of frauds as a defense, in his affidavit of merits. The affidavit of merits also contains the averment that the defendant never tendered the shares of stock or made the request for the transfer of the real estate until the defendant instituted proceedings to recover back the sum of \$1,000 that he had paid the plaintiff under the agreement. The plaintiff made a motion to strike the affidavit of merits from the files. The bill of exceptions shows that the trial court in denying this motion stated that "the motion on behalf of the plaintiff in this case was to strike the amended affidavit of merits from the files; the court holds said affidavit of merits in setting up the statute of frauds is a sufficient defense and it appearing to the court that the plaintiff states that he relies upon his statement of claim (as set forth above) and expects and intends to prove in support thereof that the plaintiff in this case entered into the contract as admitted and asserted by the defendant in his affidavit of merits, upon which statement the court holds that the evidence clearly shows a case where the statute of frauds applies; so that upon the pleadings, admission and statements of counsel, the finding of the court, is upon this hearing, for the defendant."

for the real estate, nor was the purchase price of the stock fixed by the agreement. It is also alleged by the defendant in his affidavit of merits that the \$1,000.00 which he has paid, exceeded the value of the stock and that certain representations made by the plaintiff at the time of the agreement, to the effect that it was earning a substantial profit, and that the company in question was in good financial standing, were false. The defendant also sets up the statute of frauds as a defense, in his affidavit of merits. The affidavit of merits also contains the averment that the defendant never tendered the shares of stock or made the request for the transfer of the real estate until the defendant instituted proceedings to recover back the sum of \$1,000 that he had paid the plaintiff under the agreement. The plaintiff made a motion to strike the affidavit of merits from the files. The bill of exceptions shows that the trial court in denying this motion stated that "the motion on behalf of the plaintiff in this case was to strike the amended affidavit of merits from the files; the court holds said affidavit of merits in setting up the statute of frauds is a sufficient defense and it appearing to the court that the plaintiff states that he relies upon his statement of claim (as set forth above) and expects and intends to prove in support thereof that the plaintiff in this case entered into the contract as admitted and asserted by the defendant in his affidavit of merits, upon which statement the court holds that the evidence clearly shows a case where the statute of frauds applies; so that upon the pleadings, admission and statements of counsel, the finding of the court, is upon this hearing, for the defendant."

Thereupon the court entered the judgment upon said finding in favor of the defendant and against the plaintiff, from which the plaintiff has appealed.

The only question presented on this appeal is, whether or not the case as thus made out by the pleadings and admissions of the parties as referred to by the trial court in making the finding, comes within the statute of frauds which provides that no action shall be brought to charge any person upon any contract for the sale of lands, unless such contract, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith.

In contending that the judgment and finding of the trial court was erroneous, the plaintiff has called our attention to certain authorities to the effect that, although a contract between parties comes within the statute of frauds and may, therefore, be avoided, nevertheless if it has been executed, an action will lie against the party receiving the benefits thereof as for money had and received, or goods sold and delivered. C. C. C. & St. L. Ry. Co. v. Wood, 189 Ill. 352; Eaton v. Graham, 104 Ill. App. 296, 302; Booker v. Wolf, 195 Ill. 365. These cases are not in point as they would have been if the plaintiff had filed a statement of claim reciting the contract and alleging the delivery of the stock to the defendant and its acceptance by him and his failure to turn over the agreed consideration for it to the plaintiff, and claiming the difference between the value of the stock as alleged, and such part of the consideration, if any, that had been turned over

Thereupon the court entered its judgment upon said fifth, and in favor of the defendant and against the plaintiff, from which the plaintiff has appealed.

The only question presented on this appeal is, whether or not the case at hand falls out of the jurisdiction and no reason of law appears as related to by the trial court in making the finding, unless within the statute of Florida which provides that no action shall be brought to enforce any contract or right for the sale of land, unless such contract, or some antecedent or note thereof shall be in writing and signed by the party to be enforced.

In considering that the judgment and finding of the trial court was erroneous, the plaintiff has called our attention to certain authorities to the effect that, although a contract between parties comes within the statute of Florida and may, in future, be avoided, nevertheless if it has been executed, an action will lie against the party receiving the benefits thereof as if money had and received, or goods sold and delivered, 2 U.S. 436. 171 U.S. 404, 182 U.S. 111; Wheaton v. Wheaton, 104 U.S. 386, 302; Robert v. Wolf, 125 U.S. 305. These cases are not in point as they would have been if the plaintiff had filed a statement of claim reciting the contract and alleging the delivery of the stock to the defendant and its acceptance by him and the failure to turn over the agreed consideration for it to the plaintiff, and claiming the difference between the value of the stock as sold and the part of the consideration, if any, which had been turned over.

by the defendant. After default has been made by either party to a contract voidable under the statute of frauds, neither party can sue the other on the basis of an implied agreement except as to such part of the voidable contract as he may have executed, and in order to recover in such an action, the plaintiff must both allege and prove that he has executed his part of the voidable contract, either in whole or in part, and on the basis of that execution, seek to recover the fair and reasonable compensation due him by reason of the execution. But no action can successfully be prosecuted based upon an implied contract where the expressed contract between the parties remains executory so far as the plaintiff is concerned.

In the case at bar, the plaintiff does not allege that he has executed the expressed contract which the parties made, by delivering the stock in question to the defendant, and it appears from the statement of the trial court contained in the bill of exceptions, as quoted above, that it was admitted by the plaintiff that in bringing his action, he was relying upon the expressed contract which the parties had made. That being the case, the affidavit of merits so setting up the statute of frauds, interposed a complete defense to the action.

There is an intimation in the affidavit of merits that after the defendant had paid the \$1,000.00 under the expressed oral contract, he had made with the plaintiff, he sought to avoid the contract and recover the amount he had paid, whereupon the plaintiff made tender of the stock. By such tender, the plaintiff could not successfully place himself in a position which would permit him to sue

by the defendant. After default has been made by either party to a contract voidable under the statute of frauds, neither party can sue the other on the basis of an implied agreement except as to such part of the voidable contract as he may have executed, and in order to recover in such an action, the plaintiff must both allege and prove that he has executed his part of the voidable contract, either in whole or in part, and on the basis of that execution, seek to recover the full and reasonable compensation due him by reason of the execution. But no action can successfully be prosecuted based upon an implied contract where the executed contract between the parties remains executory as far as the plaintiff is concerned.

In the case at bar, the plaintiff does not allege that he has executed the expressed contract which the parties made, by delivering the stock in question to the defendant, and if a party from the statement of the trial court contained in the bill of exceptions, as quoted above, that it was admitted by the plaintiff that in bringing his action, he was relying upon the expressed contract which the parties had made. That being the case, the affidavit of facts so setting up the statute of frauds, introduced a complete defense to the action.

There is an indication in the affidavit of facts that after the defendant had paid the \$1,000 of order, the expressed oral contract, he had made with the plaintiff, he sought to avoid the contract and recover the amount he had paid, based on the plaintiff's made tender of the stock. By such tender, the plaintiff could not successfully place himself in a position which would permit him to sue

the defendant because, as we have already stated, the law will not imply any agreement in case of a contract voidable under the statute of frauds except as to such part of the contract as may have been executed. In such a case, the law implies an agreement or obligation on the part of the purchaser because it will not permit him to have the benefit of the execution of the contract by the plaintiff, and at the same time, avoid the payment of proper compensation to the plaintiff for the execution. In the case at bar, no such implied agreement will be created until and unless the defendant had received and accepted the stock which was the subject of the expressed contract between the parties.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

the defendant because, as we have already stated, the law will not imply any agreement in case of a contract voidable under the statute of frauds except as to such part of the contract as may have been executed. In such a case, the law implies an agreement or obligation on the part of the purchaser because it will not permit him to have the benefit of the execution of the contract by the plaintiff, and at the same time, avoid the payment of proper compensation to the plaintiff for the execution. In the case at bar, no such implied agreement will be created until and unless the defendant had received and accepted the stock which was the subject of the expressed contract between the parties.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

408 - 23753

ABRAHAM M. LIEBLING,

Appellee,

vs.

CHARLES RENFER and
ANNA M. RENFER,

Appellants.

APPEAL FROM

COUNTY COURT,

COCK COUNTY.

211 I.A. 370

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Abraham M. Liebling, brought this suit against the defendants, Charles Renfer and Anna M. Renfer to recover \$750.00 which he paid them as earnest money under a contract providing for the purchase of certain real estate. A trial was had without a jury and the court found the issues for the plaintiff and entered a judgment against the defendants for the full amount of the claim, from which they have appealed. The contract was dated September 13, 1913, and was in the usual form of contracts for the purchase of real estate. The full contract price agreed upon by the parties was \$20,000.00. The contract contained the following clauses: "said purchaser has paid \$750.00 earnest money and agrees to pay in five days after title has been examined and found good and accepted by him, a further sum of \$9,250.00 * * *" "complete merchantable abstract of title or merchantable copy thereof brought down to the date hereof or merchantable title guarantee policy by the Chicago Title and Trust Company shall be

ABRAHAM S. LIEBLING,

Appellee,

vs.

CHARLES HENNER and
ANNA S. HENNER,

Appellants.

ALL IN THE
COURT COURT,
COOK COUNTY.

211 A 370

THE JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Abraham S. Liebling, brought

this suit against the defendants, Charles Henner and

Anna S. Henner to recover \$750.00 which he paid them

as earnest money under a contract providing for the

purchase of certain real estate. A trial was had

without a jury and the court found the issues for the

plaintiff and entered a judgment against the defendants

for the full amount of the claim, from which they have

appealed. The contract was dated September 13, 1913,

and was in the usual form of contracts for the purchase

of real estate. The full contract price agreed upon by

the parties was \$20,000.00. The contract contained the

following clauses: "said purchaser has paid \$750.00

earnest money and agrees to pay in five days after title

has been examined and found good and accepted by him, a

further sum of \$19,250.00 * * * "complete merchantable

abstract of title or merchantable copy thereof brought

down to the date hereof or merchantable title guarantee

policy by the Chicago Title and Trust Company shall be

furnished by vendor within reasonable time, * * *.

It appears from the record that the defendants never tendered an abstract of title to the property in question or a guarantee policy, to the plaintiff. So far as the record shows, nothing was done by either party to the contract until the 29th of November, when the defendant, Charles Renfer, saw the plaintiff and said to him "How about closing up with that property? I have got to have the money." At this time, an opinion of title by the Chicago Title and Trust Company was tendered to the plaintiff. There is conflict in the testimony as to what the plaintiff replied at that time. The defendant Renfer testified that his reply was "Charlie, I am a sport. I can't come across." The plaintiff testifies that what he told the defendant at that time was, he "couldn't do anything within two weeks; that after two weeks it would be all right, in good shape. The plaintiff further testifies that the defendant said that it had to be done immediately. He testified further that about two weeks later he went to the defendant Renfer with a certified check for the amount then due under the contract and asked him to carry out the deal, but that Renfer then said to him "You can't buy this now;" and that he then raised his price to \$22,000.00. The defendant Renfer denies that he had ever raised his price and on the witness stand, stated that he had told the plaintiff a good many times "when you come across with \$20,000.00 you can have it." On ^{re-}cross examination, counsel for the plaintiff asked the defendant, Renfer, "are you perfectly willing to close the deal now on the basis of this contract? Renfer replied that he would do business with

furnished by vendor within reasonable time, * * *

It appears from the record that the defendant

never tendered an abstract of title to the property in question or a guarantee policy, to the plaintiff. He far as the record shows, nothing was done by either party to the contract until the 10th of November, when the defendant, Charles Renfer, saw the plaintiff and said to him "Now about clearing up with that property? I have got to have the money." At this time, an opinion of title by the Chicago Title and Trust Company was rendered to the plaintiff. There is conflict in the testimony as to what the plaintiff replied at that time. The defendant Renfer testified that his reply was "Gladly, I am a sport. I don't come across." The plaintiff testifies that what he told the defendant at that time was, he "couldn't do anything within two weeks; that after two weeks it would be all right, in good shape. The plaintiff further testifies that the defendant said that it had to be done immediately. He testified further that about two weeks later he went to the defendant Renfer with a certified check for the amount then due under the contract and asked him to carry out the deal, but that Renfer then said to him "You can't buy this now;" and that he then raised his price to \$25,000.00. The defendant Renfer denies that he had ever raised his price and on the witness stand, stated that he had told the plaintiff a good many times "when you come across with \$25,000.00 you can have it." On cross examination, counsel for the plaintiff asked the defendant, Renfer, "are you perfectly willing to close the deal now on the basis of this contract? Renfer replied that he would do business with

the plaintiff on the basis of \$20,000.00 outside of the contract, but was unwilling to credit the \$750.00 on the contract, saying that the question as to the \$750.00 was "up to the court to decide." The trial court decided that under all the facts, the plaintiff was entitled to a return of the money he had paid.

In urging a reversal of the judgment below, the defendants contend that, although it was incumbent upon them, under the terms of the contract to furnish the plaintiff with a merchantable abstract of title or a guarantee policy before the plaintiff could be placed in default, this performance on their part was waived by the plaintiff when he said that he "couldn't come across," thus intimating he was not in a position to carry out the contract. In the view we take of this case, this is the only question involved here. There is some argument in the briefs submitted by counsel on both sides on the question of whether the amount paid as earnest money is to be considered as a penalty or as liquidated damages. That question we deem to be entirely immaterial under the facts of the case. It is admitted that no abstract of title and guarantee policy was ever submitted to the plaintiff by the defendants, although at one time, but it is not clear from the record, just when, the defendants executed a warranty deed conveying the property to the plaintiff. Although time is declared to be the essence of the contract, by its terms, the defendants are not in a position to raise any question as to time of performance of any of its conditions, for, it appears some six weeks elapsed after the contract was signed, before any attempt was made by them to submit anything to the plaintiff as evidence of

the plaintiff on the basis of the, 1900, to certain of the contract, but was willing to settle for \$750.00 on the contract, saying that the question as to the \$750.00 was left to the court to decide. The trial court decided that under all the facts, the plaintiff was entitled to a return of the money he had paid.

In giving a reversal of the judgment below, the defendant's counsel stated, although it was incumbent upon them, under the terms of the contract to return the plaintiff with a permanent abstract of title or a guarantee policy before the plaintiff could be placed in default, this performance on their part was waived by the plaintiff when he said that he "couldn't come down", thus indicating he was not in a position to carry out the contract. In the view of this court, this is the only question involved here. There is some argument in the briefs submitted by counsel on both sides on the question of whether the plaintiff could as a matter of course be considered as a guarantor or as a limited partner. That question we deem to be entirely immaterial under the facts of the case. It is admitted that no abstract of title and guarantee policy was ever submitted to the plaintiff by the defendant, although at one time, but it is not clear from the record, just when, the defendant's executed a warranty deed conveying the property to the plaintiff. A judgment was declared as to the recovery of the contract, by the court, the defendant are not in a position to raise any question as to time of performance of any of its obligations, but it appears from the record filed after the contract was signed, before any attempt was made by the plaintiff to sue the plaintiff as evidence of

the condition of the title and it was some two weeks after that, that the plaintiff testifies he tendered the defendant Renfer a check for "the full amount then due under the contract." The defendant Renfer testified that at no time did the plaintiff say he would be able to carry out the terms of the contract.

In our opinion, the trial court did not err in finding that there was no waiver on the part of the plaintiff as to the performance of those conditions of the contract on the part of the defendants involving the delivery of a complete merchantable abstract of title, or a merchantable copy brought down to the date of the contract, or a merchantable title guarantee policy to the Chicago Title and Trust Company. The defendants had the burden of proof on that point (40 Cyc. 269) and as the trial court stated, they failed to sustain it. If there was no waiver on the part of the plaintiff, he could not be placed in default under the terms of the contract until the defendants had performed the conditions incumbent upon them under the contract as to the furnishing of an abstract of title or a guarantee policy. Even assuming that the defendants complied with that condition in submitting the opinion of title by the Chicago Title and Trust Company, the tender of the certified check by the plaintiff for "full amount then due under the contract" was a sufficient compliance with the contract on the part of the plaintiff, even though a tender of that certified check did not occur until two weeks after the submission of the opinion of title. This was a sufficient compliance with the contract so far as the

the condition of the title and it was some two weeks after that, that the plaintiff testified he received the defendant's check for "the full amount then due under the contract." The defendant's check testified that at no time did the plaintiff say he would be able to carry out the terms of the contract.

In our opinion, the trial court did not err in finding that there was no waiver on the part of the plaintiff as to the performance of these conditions of the contract on the part of the defendant involving the delivery of a complete merchantable abstract of title, or a merchantable copy brought down to the date of the contract, or a merchantable title guarantee policy to the Chicago title and Trust Company. The defendant had the burden of proof on that point (40 Cyc. 239) and as the trial court stated, they failed to sustain it. If there was no waiver on the part of the plaintiff, he could not be placed in default under the terms of the contract until the defendant had performed the conditions incumbent upon them under the contract as to the furnishing of an abstract of title or a guarantee policy. Even assuming that the defendant complied with that condition in submitting the opinion of title by the Chicago title and Trust Company, the tender of the certified check by the plaintiff for "full amount then due under the contract" was a sufficient compliance with the contract on the part of the plaintiff, even though a tender of that certified check did not occur until two weeks after the submission of the opinion of title. This was a sufficient compliance with the contract so far as to

time of performance is concerned in view of the fact that the defendants had allowed some six weeks to elapse between the date of the contract and the time when, so far as the record shows, they tendered the alleged opinion of title to the plaintiff.

Finding no error in the record, the judgment of the County Court is affirmed.

AFFIRMED.

time of performance is concerned is view of the fact that the defendant had allowed some six weeks to elapse between the date of the contract and the time when, so far as the record shows, they tendered the alleged opinion of title to the plaintiff.

Finding no error in the record, the judgment of the County Court is affirmed.

APPEAL.

255 - 23600

FRANCES BOWSER,
Appellee,

vs.

MUSICAL COURIER COMPANY,
a corporation,
Appellant.

4210
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

211 I.A. 372

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$388.25 recovered by plaintiff for commissions alleged to be due.

Plaintiff was employed by defendant to solicit subscriptions to the latter's publication and contracts for advertising matter to be inserted therein. The contract of employment was a verbal one and the only dispute between the parties is as to the time the payment of the commissions earned by the plaintiff was to be made. It is plaintiff's contention that they were to be paid according to the terms of each subscription or advertising contract procured by her and accepted by the defendant, while the defendant insists that plaintiff's commissions were not payable until the amounts due on the contracts solicited by plaintiff had been paid. All uncertainty on this point might have been avoided by making a written contract of employment, in the absence of which resort must be had to the evidence of the parties, in order to determine such question. The court found the issues for the plaintiff, and inasmuch as the evidence is conflicting, we are unable to say that such finding is clearly and manifestly against the weight of the evidence.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

4270
S.I.A. 372

MR. JUSTICE MCDONALD DELIVERED HIS OPINION ON THE COURT.

MUNICIPAL COURT
OF CHICAGO

APPEAL FROM

Appellee,

vs.

MEDICAL COMMERCE COMPANY,
a corporation,
Appellant.

355 - 23600

This is an appeal by the defendant from a judgment for \$308.25 recovered by plaintiff for commissions alleged to be due.

Plaintiff was employed by defendant as solicitor subscriptions to the latter's publication and contracts for advertising matter to be inserted therein. The contract of employment was a verbal one and the only dispute between the parties is as to the time the payment of the commissions earned by the plaintiff was to be made. It is plaintiff's contention that they were to be paid according to the terms of each subscription or advertising contract procured by her and accepted by the defendant, while the defendant insists that plaintiff's commissions were not payable until the amounts due on the contracts solicited by plaintiff had been paid. All uncertainty on this point might have been avoided by making a written contract of employment, in the absence of which resort must be had to the evidence of the parties, in order to determine such question. The court found the issues for the plaintiff, and inasmuch as the evidence is conflicting, we are unable to say that such finding is clearly and manifestly against the weight of the evidence. There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

HELEN GUTHMAN,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 373

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of being an inmate of a house of ill fame, in violation of Sec. 57 a-1, chap. 38, P. S. The cause was tried before the court without a jury. There was a finding of guilty and defendant was sentenced to imprisonment in the house of correction for a term of sixty days.

The gravamen of the defendant's complaint is that she was arrested without a warrant. We think that as defendant submitted herself to the jurisdiction of the court without challenging the mode or manner of her arrest, the court had consequently jurisdiction to hear the case and pronounce judgment.

The Criminal Code provides that an officer may arrest a person if he has reasonable ground for believing that the person arrested has committed a crime. While this is admitted by defendant's counsel, he contends that this has application only to cases of felony and not to misdemeanors. It is also argued that the offense charged could not have been committed in the presence of the officer.

In the absence of the evidence we must assume that the offense charged was committed in the presence of the officer, and that such evidence proved that defendant was an

CHARGE TO HONORABLE COURT
OF CHICAGO.

STATE OF THE STATE OF
ILLINOIS.
Defendant in error.
vs.
PEOPLE OF THE STATE OF
ILLINOIS.
Plaintiff in error.

2111.A.373

THE FURNITURE STORES UNION
DELIVERED THE ORDER ON THE COURT.

Defendant was convicted of being an inmate of
a house of ill fame, in violation of Sec. 4-1, Chap. 38,
U. S. The court was tried before the court without a jury.
There was a finding of guilty and defendant was sentenced to
imprisonment in the house of correction for a term of sixty
days.

The grounds of the defendant's complaint is
that he was arrested without a warrant. We think that as
defendant submitted himself to the jurisdiction of the court
without challenging the mode or manner of his arrest, the
court had competence jurisdiction to hear the case and
pronounce judgment.

The criminal code provides that an officer may
arrest a person if he has reasonable ground for believing
that the person arrested has committed a crime. While this
is satisfied by defendant's conduct, he contends that this
has application only to cases of felony and not to misdemeanors.
It is also argued that the offense charged could not have been
committed in the presence of the officer.

In the absence of the evidence we must assume
that the offense charged was committed in the presence of the
officer, and that such evidence proved that defendant was an

inmate as charged.

On the assumption which obtains in the condition of this record that the offense charged in the complaint was committed in the presence of the officer making the arrest, such arrest was lawful and could be made, as it was, without the issuance of a warrant. The rule on this subject is well stated in vol. I, Bishop's Criminal Procedure, p. 128, thus:

"Where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, for 'why issue a warrant for the apprehension of a party already in custody?' But a written complaint or information against the defendant, setting out his offense, is necessary in such a case as in any other." Schwartz v. Poehlman, 178 Ill. App. 235; People v. Barkas, 255 Ill. 516.

There is no reversible error in this record and the judgment of the Municipal court is therefore affirmed.

AFFIRMED.

inmate as charged.

On the assumption which obtains in the condition of this record that the offense charged in the complaint was committed in the presence of the officer making the arrest, such arrest was lawful and could be made, as it was, without the issuance of a warrant. The rule on this subject is well stated in vol. 1, Black's Criminal Procedure, § 126, thus:

"Where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, for 'why issue a warrant for the apprehension of a party already in custody?' But a written complaint or information against the defendant, setting out his offense, is necessary in such a case as in any other." People v. Parker, 103 Ill. 516.

There is no reversible error in this record.

and the judgment of the Appellate Court is therefore affirmed.

APPROVED.

FRANK A. MESSENGER,
Defendant in Error,

vs.

MRS. A. B. WENDELL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 374

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. The action is of the first class, for goods sold and delivered according to an itemized statement attached to the statement of claim. The action was commenced against Edward Wendell and Mrs. A. B. Wendell and the statement of claim declared against them as jointly liable. Before the trial the suit was discontinued as to Edward Wendell and there was no amendment of the pleadings thereafter. The cause was submitted to the court, who made a finding in favor of plaintiff and against defendant with an assessment of damages at \$1828.54, upon which judgment was entered.

The errors argued resolve themselves into but one contention, viz: that the statement of claim not having been amended after Edward Wendell was dismissed out of the cause, it is not sufficient to sustain the judgment.

From the record it may at this point be said that this question is raised here for the first time.

The parties proceeded to trial voluntarily and without objection as to the state of the pleadings. The statutory record only is before us; we must therefore assume that the evidence warranted the finding and judgment. Defendant might have advantaged of the imperfection in the

FRANK A. KESSINGER,
Defendant in Error,
vs.
WILLIAM A. B. KESSINGER,
Plaintiff in Error.

ORDER TO MAINTAIN COURT
OF CHICAGO.

374 A. I. A.

THE CHIEF JUSTICE
DELIVERED THE OPINION OF THE COURT.

This is an undenied appeal. The action is of the first class, for goods sold and delivered according to an itemized statement attached to the statement of claim. The action was commenced against Edward Wendell and Mrs. A. B. Wendell and the statement of claim declared against them as jointly liable. Before the trial the sale was discontinued as to Edward Wendell and there was no amendment of the pleadings thereafter. The cause was submitted to the court who made a finding in favor of plaintiff and against defendant with an assessment of damages at \$1828.54, upon which judgment was entered.

The errors argued resolve themselves into but one contention, viz: that the statement of claim not having been amended after Edward Wendell was dismissed out of the cause, it is not sufficient to sustain the judgment. When the record is read at this point he said that this question is raised here for the first time.

The parties proceeded to trial voluntarily and without objection as to the state of the pleadings. The statutory record only is before us; we must therefore assume that the evidence warranted the finding and judgment. Defendant might have advantage of the imperfection in the

statement of claim by demurring thereto. In Condon v. Schoenfeld, 214 Ill. 226, the court found that after the dismissal of one defendant the proofs showed there was no cause of action against the remaining defendant, and it therefore reversed the judgment. But this case is not analogous to the one under discussion.

In the absence of evidence to the contrary the presumption obtains that the evidence heard warrants the finding and supports the judgment. The verdict cures the infirmity in the statement of claim. Furthermore, in actions ex contractu joint obligations are by statute made joint or several. Sec. 3, chap. 76, R. S., is as follows:

"All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." Combs v. Steele et al., 80 Ill. 101.

So that whether the obligation was joint or several, either party thereto might have been proceeded against singly.

The infirmity charged as existing in the statement of claim would have been well taken if made in the trial court; but the infirmity is cured by the verdict; the rule regarding this being that where there is any defect, imperfection or omission in pleading, whether in substance or form, which would have been fatal to objection upon demurrer, yet if the issue found be such as necessarily required on the trial proof of the fact so defectively or imperfectly stated, or omitted, and without which it is not to be presumed the judge would have directed the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict. 1 Chitty's Pl. 672; Keegan v. Kinnare, 123 Ill. 280; Chicago and Eastern Illinois Railroad Company v. Hines, 132 Ill. 161; Chicago and Alton Railroad Co. v. Clausen, 173 *ibid* 100; City of Chicago v. Lonergan, 196 *ibid* 518; Storm v. Cleveland, 156 Ill. App. 88; B. & O. S.

statement of claim by demurring thereto. In London v. Johnson, 104 Ill. 286, the court found that after the dismissal of one defendant the proofs showed there was no cause of action against the remaining defendant, and it therefore reversed the judgment. But this case is not analogous to the one under discussion.

In the absence of evidence to the contrary the presumption obtains that the evidence heard sustains the finding and supports the judgment. The verdict cures the infirmity in the statement of claim. Furthermore, in actions ex contractu joint obligations are by statute made joint or several. Sec. 3, Chapt. 78, R. S., is as follows:

"All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." Combs v. Steele et al., 86 Ill. 101.

So that whether the obligation was joint or several, either party thereto might have been proceeded against singly. The infirmity charged as existing in the statement of claim would have been well taken if made in the trial court; but the infirmity is cured by the verdict; the rule regarding this being that where there is any defect, imperfection or omission in pleading, whether in substance or form, which would have been fatal to objection upon demurrer, yet if the issue found be such as necessarily required on the trial proof of the fact so defectively or imperfectly stated, or omitted, and without which it is not to be presumed the judge would have directed the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict. 1 Chitt's Pl. 672; Kearney v. Kinnear, 123 Ill. 280; Chicago and Western Illinois Railroad Co. v. Jones, 111 Ill. 101; Chicago and Alton Railroad Co. v. Gibson, 173 Ill. 100; City of Chicago v. Jones, 180 Ill. 818; Stowe v. Cleveland, 156 Ill. App. 58; R. S. 3.

W. Ry. Co. v. Keck, 185 Ill. 400; Knisley v. Brown, 95 Ill. App. 516; City of Elgin v. Thompson, 98 ibid 358; C. & A. R. R. Co. v. Murphy, 99 ibid 126.

In Carnegie v. Dawsey, 178 ibid 413, it was held that the rule that in a joint action ex contractu a dismissal as to one defendant effects a discontinuance of the entire action, does not apply where the party against whom dismissal was had was not a party to the contract.

In the light of the authorities cited and in the absence of the evidence, we must assume that the defendant who was dismissed out of the action was not a party to the contract in suit, but that the obligation was the several obligation of defendant and that proof of such fact was made by the evidence. As held in C. & A. R. R. Co. v. Clausen, supra, a defect in pleading, in substance or form, which would be fatal on demurrer is cured by verdict where the issue joined is such as necessarily requires proof of the facts so imperfectly stated or omitted.

For the foregoing reasons the judgment of the Municipal court is affirmed.

AFFIRMED.

E. V. Co. v. Enoch, 185 Ill. 400; Telegraph v. Enoch, 98 Ill.

App. 316; City of Chicago v. Telegraph, 98 Ill. 358; Q. R. R.

E. V. Co. v. Murphy, 98 Ill. 126.

In Carroll v. Lewis, 178 Ill. 413, it was

held that the rule in a joint action ex contractu

applied as to one defendant effecting a discontinuance of the

entire action, does not apply where the party against whom

discontinuance was not a party to the contract.

In the light of the authorities cited and in

the absence of the evidence, we must assume that the de-

fendant who was dismissed and the action was not a party

to the contract in suit, but that the obligation was the several

obligation of defendant and that proof of such fact was made

by the evidence. As held in E. V. Co. v. Enoch,

where a defect in pleading, in substance or form, which would

be fatal on demurrer is cured by verdict upon the issue

joined in such as necessarily requires proof of the facts so

imperfectly stated or omitted.

For the foregoing reasons the judgment of the

trial court is affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

MATTHEW BRADY,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 376

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of non-support on an information filed by his wife. The information charged that defendant then and there, without reasonable cause, did neglect and refuse to maintain and provide for his wife, who was then and there in destitute and necessitous circumstances.

Defendant waived trial by jury and the cause was submitted to the court, who found him guilty.

The record recites that defendant was present in his own proper person and that he was also represented by counsel. He was on his own motion released on probation and gave bond, as the statute provides. For a violation of the condition of his probation he was brought into court and was ordered to pay his wife \$10 a week. Subsequently he made a motion to vacate the finding and judgment of the court. The affidavits in support of this motion were extremely rhetorical and did not present any facts excusing defendant from interposing as a defense at the time of his trial the matters disclosed in the affidavits. We cannot therefore say that the trial Judge abused the discretion which the law reposes in him in such cases.

INVESTIGATION OF THE STATE OF
ILLINOIS

Defendant in Error

vs.

MATTHEW BRADY

Plaintiff in Error

ORDER TO REINSTATE COURT
OF CHICAGO

ILL. A. 378

IN RE MATTHEW BRADY

DELIVERED THE DECISION OF THE COURT

Defendant was convicted of non-support on an information filed by his wife. The information charged that defendant lived and earned, without reasonable cause, did not support and refuse to maintain and provide for his wife, who was then and there in destitute and necessitous circumstances.

Defendant waived trial by jury and the case

was submitted to the court, the record being as follows:

The record reflects that defendant was present

in his own proper person and that he was also represented by counsel. He was on his own motion released on probation and gave bond, as the statute provides. Not a violation of the condition of his probation he was brought into court and was ordered to pay his wife \$1 a week. Subsequently he made a motion to vacate the finding and judgment of the court. The affidavits in support of this motion were expressly rhetorical and did not present any facts exculpatory defendant from liability.

Being as a defense at the time of his trial the matters disclosed in the affidavits, he cannot therefore say that the trial judge abused the discretion which the law requires in his in such cases.

It is urged that defendant was deprived of his statutory right to be represented by counsel. In view of the record, which recites that he was represented by counsel upon the trial, this objection fails.

It is also urged that the court's finding that defendant was guilty "in manner and form as charged in the information herein" does not find him guilty of the offense charged. We think, however, that the finding was sufficient. It was held in People v. Murphy, 188 Ill. 144, that a verdict of guilty in manner and form as charged in the indictment was a sufficient finding that the defendant was guilty of murder, and that the judgment on such finding was sufficient.

The evidence not being before us, we cannot say that the judgment is not supported thereby.

There being no reversible error in this record, the judgment of the Municipal court is affirmed.

AFFIRMED.

It is urged that defendant was deprived of his
statutory right to be represented by counsel. In view of
the record, which reflects that he was represented by counsel
upon the trial, this objection fails.
It is also urged that the court's finding that
defendant was guilty "in honor and love as charged in the
information herein" does not find him guilty of the offense
charged. We think, however, that the finding was sufficient.
It was held in People v. Jurek, 188 Ill. 144, that a verdict
of guilty in honor and love as charged in the indictment
was a sufficient finding that the defendant was guilty of
murder, and that the judgment on such finding was sufficient.
The evidence not being before us, we cannot say
that the judgment is not supported thereby.
There being no reversible error in this record,
the judgment of the trial court is affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

PETER TUHL,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 377

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of the criminal offense of "larceny of the value of \$5," sentenced to a term of one year in the house of correction, fined \$25 and condemned to pay the costs.

The evidence is not before us. The statutory record only has been filed.

Defendant urges two points for reversal - one, that the information charges that the subject of the larceny was "the personal goods and property of the P. C. C. and St. L. R. R. Co.," the other, that the finding of the court does not fix the value of the property which defendant was convicted of stealing.

In the condition of the record neither of these points is tenable. For aught that is disclosed by the record the name of the corporation that owned the property stolen is, as alleged in the information, the P. C. C. and St. L. R. R. Co. If it were otherwise, it would follow that the information would be insufficient under the authority of Accola v. Chicago, Burlington & Quincy Ry. Co., 70 Iowa, 185. In that case the record shows that the defendant, designated as "C. B. & Q. R. R. Co.," was in fact the Chicago, Burlington

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
vs.
PETER J. JAMES,
Plaintiff in Error.

CHARGE TO JURY
OF ILLINOIS.

ILL. 377

IN SENATE
JANUARY 10, 1901
DELIVERED THE CHARGE OF THE COURT.

Defendant was convicted of the criminal offense
of "larceny of the value of \$5," sentenced to a term of one
year in the house of correction, fined \$25 and sentenced to
pay the costs.

The evidence is not before us. The statutory
record only has been filed.

Defendant raises two points for reversal - one,
that the information charges that the subject of the larceny
was "the personal goods and property of the P. C. and St.
I. R. Co.," the other, that the finding of the court does
not fix the value of the property which defendant was con-
victed of stealing.

In the condition of the record neither of these
points is capable. For aught that is disclosed by the record
the name of the corporation that owned the property stolen
is, as alleged in the information, the P. C. and St. I.
R. Co. If it were otherwise, it would follow that the
information would be insufficient under the authority of
People v. Chicago, Burlington & Quincy Ry. Co., 70 Iowa, 188.

In that case the record shows that the defendant, designated
as "O. E. & E. Ry. Co.," was in fact the Chicago, Burlington

& Quincy Railway Company. While we may have a grave suspicion that the P. C. C. and St. L. R. R. Co. may not be a corporation chartered under these initials, yet we have no right to decide the cause according to our suspicion dehors the record.

It has often been decided that an essential part of the finding in a larceny case, by either court or jury, is the value of the property the subject of the larceny. This cannot be dispensed with, as it is necessary to find the value in order to fix the punishment under the statute. But we are of the opinion that the finding by the court that defendant was guilty of "the criminal offense of larceny to the value of \$5," though inartificial, meets the statutory requirement.

There being no reversible error in this record, the judgment of the Municipal court is affirmed.

AFFIRMED.

A Quincy Railway Company. While we may have a grave suspicion that the R. O. V. and St. L. & Co. may not be a corporation chartered under these initials, yet we have no right to decide the cause according to our suspicion before the record.

It has often been decided that an essential part of the finding in a felony case, by either court or jury, is the value of the property the subject of the felony. This cannot be dispensed with, as it is necessary to find the value in order to fix the punishment under the statute. But we are of the opinion that the finding by the court that defendant was guilty of "the criminal offense of larceny to the value of \$5," though insufficient, meets the statutory requirement.

There being no reversible error in this record, the judgment of the Municipal court is affirmed.

APPROVED.

102 - 24018

AMERICAN STEEL SPRING CO.,
a corporation,

Appellee,

vs.

WILLIAM J. BOYER,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 379

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal by defendant from a judgment against it of \$57.80, entered upon the finding of the trial Judge, to whom the cause was submitted.

Plaintiff sued defendant for the amount of the judgment on the claim that it had ordered certain springs of a designated design, which were not kept in stock by plaintiff but were made specially for defendant; that defendant refused to accept the springs when they were tendered, and that as they were of no use or value to plaintiff the damage suffered by defendant's breach of the claimed contract was the full amount of the price named in the so-called contract.

The transaction was conducted by correspondence, and while there were personal interviews and talks over the telephone, each was confirmed by a letter. The first letter was written April 17, 1916, by plaintiff to defendant, in which the price of the springs was quoted, the letter concluding: "Trusting that we may be favored with your order by return mail; we beg to remain." The next letter was also by plaintiff to defendant in answer to defendant's telephone call, in which letter plaintiff wrote: "In answer to your phone request, we are pleased to quote you the following prices on swivel hook springs:" (here setting forth the kind,

APPLICANT
WILLIAM J. BOYER
Applicant

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

2111.A.379

MR. PRESIDING JUDGE

DELIVERED THE OPINION OF THE COURT.

This is an undenied appeal by defendant from a judgment against it of \$37.50, entered upon the finding of the trial judge, to whom the case was submitted.

Plaintiff sued defendant for the amount of the judgment on the claim that it had ordered certain springs of a designated design, which were not kept in stock by plaintiff but were made specially for defendant; that defendant refused to accept the springs when they were tendered, and that as they were of no use or value to plaintiff the damage suffered by defendant's branch of the chain hardware was the full amount of the price paid in the so-called contract.

The transaction was conducted by correspondence, and while there were personal interviews and talks over the telephone, each was confirmed by a letter. The first letter was written April 17, 1918, by plaintiff to defendant, in which the price of the springs was quoted, the letter concluding: "Trusting that we may be favored with your order by return mail, or by post to remain." The next letter was also by plaintiff to defendant in answer to defendant's telephone call, in which letter plaintiff wrote: "In answer to your phone request, we are pleased to quote you the following prices on swivel hook springs: (Here setting forth the kind

sizes and prices of the springs.) "We are able to make delivery on above within ten days after receipt of order. Terms C. O. D. * * * * and trusting that we may be favored with your valued order by return mail, we beg to remain."

Under date of April 24, 1916, defendant wrote plaintiff confirming the order by telephone, in which letter defendant said, among other things: "As I have done no business with you before, your terms C. O. D. are satisfactory." Two days thereafter plaintiff wrote defendant: "We are in receipt of your letter of April 24th and in reply will state that you have misunderstood our quotations," and then proceeded to quote prices, quantities and sizes of springs, continuing: "Before proceeding with order, it will be necessary for us to have cash in advance on account of the springs being a special type. Trusting that these prices will be satisfactory to you, and that you will instruct us to proceed with the order, we beg to remain." This closed the correspondence, and defendant, not being willing to accede to the changed terms from C. O. D. to cash in advance, paid no further attention to the matter, and nothing thereafter took place between the parties.

It is apparent from the foregoing that the minds of the parties did not meet and that there was, therefore, no contract between them.

The record shows that the trial Judge stated in rendering his judgment that he was sitting as judge and jury in the case, and had in considering the preponderance of the evidence taken into consideration the manner of the witnesses testifying, their candor or lack of candor, and their demeanor while testifying, that from such observations he was of the opinion that defendant was not telling the truth.

also and prices of the springs, "we are able to make delivery on above within ten days after receipt of order. Terms C. O. D. * * * and stating that we may be returned with your valued order by return mail, we had to remain."

Under date of April 24, 1911, defendant wrote plaintiff confirming the order by telephone, in which letter defendant said, among other things: "As I have done no business with you before, your terms C. O. D. are satisfactory." Two days thereafter plaintiff wrote defendant: "We are in receipt of your letter of April 24th and in reply will state that you have misunderstood our quotations," and then proceeded to quote prices, quantities and sizes of springs, continuing: "Before proceeding with order, it will be necessary for us to have cash in advance on account of the springs being a special type. Trusting that these prices will be satisfactory to you, and that you will instruct us to proceed with the order, we beg to remain." This closed the correspondence, and defendant, not being willing to accede to the demand, terms from C. O. D. to cash in advance, said no further attention to the matter, and nothing thereafter took place between the parties.

It is apparent from the foregoing that the minds of the parties did not meet and that there was, therefore, no contract between them.

The record shows that the trial judge stated in rendering his judgment that he was sitting as judge and jury in the case, and had in considering the preponderance of the evidence taken into consideration the manner of the witnesses testifying, their candor or lack of candor, and their demeanor while testifying, that from such observations he was of the opinion that defendant was not telling the truth.

As it was not disputed that the letters in evidence were relied upon by plaintiff as constituting the contract, we are unable to understand the applicability of the observations of the trial Judge. The letters in evidence were offered by plaintiff and received in evidence as a part of its case. It is not claimed that there was any further dealings between the parties subsequent to the letter of plaintiff changing the former terms from C. O. D. to cash.

As the evidence fails to disclose a contract between the parties regarding the subject-matter in the suit, plaintiff has no right of action, and the judgment of the Municipal court is reversed and judgment of nil capiat and for costs entered here.

REVERSED WITH JUDGMENT OF NIL CAPIAT
AND FOR COSTS.

As it was not disputed that the letters in

evidence were relied upon by plaintiff as constituting

the contract, we are unable to understand the applicability

of the observations of the trial judge. The letters in

evidence were offered by plaintiff and received in evidence

as a part of its case. It is not claimed that there was any

further dealings between the parties subsequent to the

letter of plaintiff concerning the letter terms from E. W. D.

to cash.

As the evidence fails to disclose a contract be-

tween the parties regarding the ship, we are unable to find

plaintiff has no right of action, and the judgment of the

Appellate court is reversed and judgment of nil probat and

for costs entered here.

REVEREND WITH TRUSTEES OF THE CHURCH

AND FOR COSTS.

JOHN CHYLEWSKI,
Defendant in Error.

vs.

CITY OF CHICAGO,
Plaintiff in Error.

WRIT OF ERROR TO CIRCUIT
COURT OF COOK COUNTY.

211 I.A. 389

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition in the Circuit Court of Cook County for a writ of mandamus to compel the defendant to restore petitioner to a position in the Police Department of the City of Chicago as a patrolman, from which position it was alleged he had been unlawfully discharged on December 22, 1909.

The petitioner attempts to give various reasons in his petition in support of his contention that his discharge from the police force was illegal. The respondent, City of Chicago, interposed a general demurrer to the petition. The court overruled this demurrer and, respondent electing to stand by its demurrer, judgment was rendered in accordance with the prayer of the petition. Respondent brings the case here by writ of error for review.

There are several sufficient reasons shown by the brief and argument of counsel for respondent why the judgment of the Circuit court should be reversed. The allegations of fact set out in the petition are in the main the mere conclusions of the petitioner. While it is attempted to show therein that the Civil Service Commission was without jurisdiction to discharge petitioner, no facts are set forth from which we are enabled to say that the Civil Service Commission was without power to enter the order of which petitioner complains.

It is asserted in the petition that the petitioner's rights depend in some measure upon municipal ordinances. These ordinances were not set out in the petition in haec verba or in substance. It is elementary that the courts will not take judicial notice of the provisions of municipal ordinances, and that the duty is imposed upon persons relying on such ordinances to allege and prove them.

People v. Busse, 248 Ill. 16, 17.

But aside from these and other questions raised by the demurrer which was overruled, the petitioner is not entitled to the relief prayed for in his petition. It is alleged in the petition that petitioner was discharged on December 22, 1909, and he filed his petition herein, for reinstatement to the police force, on April 23, 1915. No reason is shown in the petition for his failure to seek relief from a discharge which he claims was unlawful, for a period of more than five years. It appears on the face of his petition that petitioner is guilty of laches.

In the case of Qualey v. City of Chicago, No. 21989, opinion filed January 8, 1917, this court said:

"Petitioner was discharged from the service on September 3, 1913, but did not file his original petition for mandamus until July 1, 1914, and the present amended petition until April 17, 1915. It has been held that a delay of six months in filing such a petition amounts to laches, and that laches, when shown, is a sufficient defense. Kenneally v. City of Chicago, 220 Ill. 485; Schultheis v. City, 240 Ill. 167; Clark v. City, 233 Ill. 113."

The Circuit court erred in overruling the demurrer filed by respondent to the petition, and for such error the judgment of that court is reversed and the cause is remanded with directions to enter an order sustaining the demurrer of the respondent, City of Chicago, and dismissing the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

ADAM GUTHORLE,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and
CHICAGO CITY RAILWAY COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 390

MR. JUSTICE BEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of plaintiff for the sum of \$5,000.

Plaintiff brought his suit against Chicago Railways Company, Chicago City Railway Company and Chicago Surface Lines for damages arising from injuries which it is alleged plaintiff sustained while he was attempting to board a street car at Elston and Kedzie avenues, Chicago, on February 16, 1914. The suit was dismissed as to the Chicago Surface Lines.

The first count of the declaration, which consisted of three counts, charged that the defendants "negligently and carelessly managed, controlled and operated said car at a time when plaintiff in the exercise of ordinary care for his own safety was in the act of boarding said car at or near said intersection," etc. The second count charged that defendants "negligently and carelessly, suddenly without warning started said car in a forward direction at a time when plaintiff in the exercise of due care for his own safety was then and there in the act of boarding said car," and in the third count it was charged that plaintiff in pursuance of an invitation extended to him by defendants "was then and there in the act of boarding said car when defendant negligently and carelessly, suddenly without warning started said car in a forward direction while plain-

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tiff then and theretofore in the exercise of due care for his own safety was then and there a passenger on the rear platform of said car for hire to be carried to his destination; by reason of the negligence and carelessness of defendants as aforesaid, plaintiff while in the act of boarding said car was then and there thrown," etc.

Plaintiff, a man about 53 years of age and weighing 230 pounds, at 6:30 P. M. on the day in question attempted to board the rear end of a north bound Kedzie avenue street car, which had stopped at Elston avenue to take on and let off passengers. Kedzie avenue is a north and south street and Elston avenue extends northwest and southeast. The weather was cold at the time of the accident.

There is much dispute in the evidence as to whether the plaintiff had attempted to board the car before or after it started; but however this may be, it is clear that he was injured while the car was moving upon the curve track from Elston avenue into Kedzie avenue.

It is insisted on behalf of defendant that the court erred in giving and refusing to give certain instructions; that there was error in the rulings on the evidence and that the damages are excessive. We think the 9th instruction given to the jury is subject to the criticism made of it by counsel for defendants. This instruction told the jury that if the plaintiff got on the car in question, or was in the act of boarding the same while it was standing still, it became the duty of defendants to do all that human care, vigilance and foresight could reasonably do, etc., to prevent an accident to the plaintiff while he was riding upon said car or going upon the same while it was standing still, and the jury were told that if defendants failed to use such care and diligence and that thereby injury befell the plaintiff, the plaintiff could recover.

lift them and distribute in the exercise of the duty for his own safety and there a passenger on the rear platform of said car for the purpose of his destination; by reason of the negligence and carelessness of defendant as alleged, plaintiff while in the act of boarding said car was then and there injured, etc.

Plaintiff, a man about 55 years of age and weighing 250 pounds, at 8:50 P. M. on the day in question attempted to board the rear end of a north bound Reddie Avenue street car, which had stopped at Fifteen Avenue to take on and let off passengers. Reddie Avenue is a north and south street and Fifteen Avenue extends northward and southward. The witness was told at the time of the accident.

There is much dispute in the evidence as to whether the plaintiff had attempted to board the car before or after it stopped; but however this may be, it is clear that he was injured while the car was moving upon the curve from Fifteen Avenue into Reddie Avenue.

It is insisted on behalf of defendant that the court erred in giving and refusing to give certain instructions; that there was error in the rulings on the evidence and that the charges are excessive. We think the fifth instruction given to the jury is subject to the criticism made of it by counsel for defendant. This instruction told the jury that if the plaintiff got on the car in question, or was in the act of boarding the same while it was standing still, it became the duty of defendant to be all that human care, vigilance and foresight could reasonably be expected to give and to be subject to the plaintiff while he was riding upon said car or being upon the same while it was standing still. And the jury were told that if defendant failed to use

such care and diligence and that thereby injury befall the plaintiff, the plaintiff could recover.

The charge in the declaration and, as we read it, the only charge, is that the plaintiff was injured while he was in the act of getting upon the rear end of the street car. The case must be tried again, and in such circumstances we do not care to discuss the weight or character of the evidence heard on the trial. It is sufficient to say that the question of whether the plaintiff was injured while in the act of boarding the car, or whether he had got aboard the car and was thereafter thrown off as the rear end of the car swung around the curve tracks, were questions of fact for the determination of the jury; and if the jury were of opinion that plaintiff fell or was thrown from the car after he had become a passenger thereon, then there could be no recovery by plaintiff on the charges made in the declaration.

It is true that the third count of the declaration charges:

"that plaintiff in pursuance of said invitation was then and there in the act of boarding said car when defendant negligently and carelessly, suddenly without warning started said car in a forward direction while plaintiff then and theretofore in the exercise of due care for his own safety was then and there a passenger on the rear platform of said car for hire to be carried to his destination."

The statement in the above quotation that the plaintiff "was then and there a passenger on the rear platform of said car is not sufficiently definite in its meaning to control or modify the express charge of this count that the plaintiff was injured "while in the act of boarding said car." We think the instruction in question should have been limited to the cause of action stated in the declaration. The plaintiff could not recover if the fact be that plaintiff was thrown from the car after he had got safely thereon and while it was moving on the curve tracks from Elston

The charge in the indictment was, as we read it, the only charge, is that the plaintiff was injured while he was in the act of getting upon the rear end of the street car. The case must be tried as such, and in such circumstances we do not care to discuss the weight or character of the evidence heard on the trial. It is sufficient to say that the question of whether the plaintiff was injured while in the act of getting upon the rear, or whether he had got upon the rear and was thereafter thrown off as the rear end of the car swung around the curve there, were questions of fact for the determination of the jury; and if the jury were of opinion that plaintiff fell or was thrown from the car after he had become a passenger thereon, then there could be no recovery by plaintiff on the charges made in the indictment.

It is true that the third count of the indictment is in these words:

"That plaintiff in possession of said indictment was seen and there in the act of boarding said car when defendant negligently and carelessly, and without warning or notice, caused said car to start and move forward in the exercise of due care for his own safety, and thereupon a passenger on the rear platform of said car for him to be carried to his destruction."

The statement in the above quotation that the plaintiff was then and there a passenger on the rear platform of said car is not sufficiently definite in its meaning to control or modify the general charge of this count that the plaintiff was injured while in the act of boarding said car. To make the indictment in question amendable would be limited to the issue of action stated in the declaration. The plaintiff could not recover if the fact be that plaintiff was thrown from the car after he had got safely upon and while it was moving on the curve from the station

avenue into Kedzie avenue.

The declaration contains no charge of negligence in the operation of the car except that of suddenly starting it, and the plaintiff charges that this sudden starting or jerking caused him to fall. The instruction in question authorized the jury to return a verdict against defendants if the jury believed that the defendants failed to protect plaintiff after he got upon and while he was riding upon the car. To instruct the jury with reference to a failure to perform a duty, a breach of which is not charged in the declaration, is error. Chicago & Alton Ry. Co. v. Robinson, 106 Ill. 142. >

In Lyons v. Ryerson & Son, 242 Ill. 409, 417, the Supreme court held that there could be no recovery in a case for injuries caused by the negligent conduct of a defendant where such negligence was not charged in the declaration, and this, even though there was evidence tending to show such negligence; and in deciding the case the court said:

"The conclusion that we have reached will require a retrial of this cause, and hence we should not give an opinion as to the weight of the evidence. It is manifest, however, from what has been stated, that under repeated decisions of this court the evidence was so conflicting that it was particularly important that the instructions should be accurate."

We think that the court erred in refusing to give defendant's tendered instruction No. 2. This instruction informed the jury that "if the plaintiff boarded the car safely and that he was caused to fall because of the manner in which the car was operated around the curve, and not because of the manner in which it was started, or operated while he was boarding it, then your verdict must be not guilty. This instruction in another form presents the same question that has been discussed. >

venue into debate among.

The declaration contains no charge of negligence in the operation of the car except that of suddenly starting it, and the plaintiff charges that this sudden starting or jerking caused him to fall. The instruction in question authorized the jury to return a verdict against defendant if the jury believed that the defendant failed to protect plaintiff after he got upon a while he was riding upon the car. To instruct the jury with reference to a failure to perform a duty, a person of whom is not charged in the declaration, is error. Chicago & North Western Ry. Co. v. Gehlman, 131 Ill. 142.

In York v. Hyatt, 343 Ill. 409, 417, the Supreme court held that there could be no recovery in a case for injuries caused by the negligent conduct of a defendant, where such negligence was not charged in the declaration, and this, even though there was evidence tending to show negligence; and in deciding the case the court said: "The conclusion that we have reached will require a retrial of this case, and hence we should not give an opinion as to the weight of the evidence. It is sufficient, however, that what has been stated, that under repeated decisions of this court the evidence was so conflicting that it was particularly important that the instruction should be accurate."

To think that the court erred in refusing to give defendant's tendered instruction No. 2. This instruction informed the jury that "if the plaintiff boarded the car while and that he was caused to fall because of the manner in which the car was operated around the curve, and not because of the manner in which it was started, or operated while he was boarding it, then your verdict must be for plaintiff. This instruction in another form presents the same question that has been discussed.

There was evidence heard from which the jury might conclude that the defendant fell from the car after it had started and after he got safely thereon, and if the jury did so conclude, then the plaintiff could not have recovered against the defendants for injuries so received even though caused by the negligence of defendants. Lake St. El. R. R. Co. v. Shaw, 203 Ill., 39, 42.

The evidence heard upon the trial was very close as to what happened at and just before the time of the accident. Certain testimony would if believed lead to the belief that the rear end of the platform was so crowded at the time the car started that it was impossible for plaintiff to get upon the car. The jury should have been carefully and accurately instructed with reference to the law applicable to the case.

Under the circumstances of the case, we think that the giving of instruction No. 11 relating to the subject of damages was error. The jury were informed by this instruction that in estimating damages they were to consider:

"All the facts and circumstances as shown by the evidence as to the nature and extent of the plaintiff's physical injuries, if any, his suffering in body, if any, resulting from such physical injuries and also such future suffering and loss of health, if any, as the jury may believe from the evidence and under the instructions from the court he has sustained or will sustain by reason of such injuries, his loss of time and inability to work, if any, resulting from such injuries."

This instruction in express language told the jury that they might assess damages to the full extent of plaintiff's physical injuries, etc., and were not confined to such injuries as were caused by the accident.

There was some evidence introduced on the trial which tended to prove that the plaintiff's physical condition at the time of the trial was caused by his own negli-

There was evidence heard from which the jury might conclude that the defendant fell from the car after it had started and after he had left the car, and if the jury did so conclude, then the plaintiff would not have recovered against the defendant for injuries so received even though caused by the negligence of defendant. This

Dr. M. V. D. C. v. Shaw, 100 Ill. 29, 42.

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This instruction in express language told the jury that they must assess damages to the full extent of plaintiff's physical injuries, etc., and were not confined to such injuries as were caused by the accident.

There was such evidence introduced on the trial which tended to prove that the plaintiff's physical condition at the time of the trial was caused by his own negli-

gent conduct.

In C. U. T. Co. v. Miller, 212 Ill. 49, the Supreme Court said:

"If, as contended by the plaintiff, she was in a diseased and disabled condition, it was improper for the jury to take that condition into consideration unless that condition was shown by the evidence to have resulted from this accident. If such a condition was shown to exist, the jury were authorized by this instruction to consider it in estimating the damages, while under the law they should not have considered such condition unless the evidence went further and showed that such condition resulted from the accident, and while it is true that other instructions advised them that she could recover no damages except such damages as resulted from the accident, still this instruction directed them, in estimating the amount of such damages, to consider her present physical condition, as shown by the evidence, from which the jury could not conclude that they were authorized to consider her present physical condition as resulting from the accident."

It appears in the Miller case, supra, that an instruction substantially similar to the one under consideration was held objectionable even though in that case other instructions advised the jury that plaintiff could recover no damages except such as resulted from the accident. In the instant case no instruction was given which tended to correct the error complained of.

In view of what has been said it will be unnecessary to determine other questions presented by the briefs of counsel.

The judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

best conduct.

In W. T. Co. v. Miller, 212 Ill. 43, the

supreme court said:

"If, as contended by the plaintiff, we are in a diseased and disabled condition, it was improper for the jury to take that condition into consideration unless that condition was shown by the evidence to have resulted from this accident. If, however, a condition was shown to exist, the jury was authorized by this instruction to consider it in estimating the damages, while under the law they should not have considered such condition unless the evidence was further and more convincing than the evidence from the accident. And while it is true that other instructions advised them that they could recover no damages except such as they were entitled to from the accident, still this instruction directed them, in estimating the amount of damages, to consider not present physical condition, as shown by the evidence, from which the jury could not conclude that they were authorized to consider the present physical condition as resulting from the accident."

It appears in the Miller case, supra, that an instruction substantially similar to the one under consideration was held objectionable even though in that case other instructions advised the jury that plaintiff could recover no damages except such as resulted from the accident. In the instant case no instruction was given which tended to correct the error complained of.

In view of what has been said it will be unnecessary to rehearse other questions presented by the briefs of counsel. The judgment of the superior court will be reversed and the cause remanded to that court for a new trial.

FORWARD REVEREND AND
CAUSE REVEREND.

545 - 23890

SOUTH PARK COMMISSIONERS,
a corporation,

Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellee.

211 I.A. 393

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DENVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, South Park Commissioners, a corporation, brought suit in the Municipal court of Chicago against the Chicago City Railway Co., a corporation, to recover the cost of paving and repairing the four street and boulevard intersections following:

East 47th Street and Grand Blvd.
East 22nd Street and So. Michigan Ave.
East 35th Street, Grand Blvd. and South Park Ave.
East 35th Street and Michigan Ave.

The case was tried by the court without a jury and judgment was entered in favor of the plaintiff for the sum of \$1,857.20, being the amount expended by plaintiff for paving and repairing the intersections of 35th street and Michigan boulevard and 35th street and South park avenue. The appeal to this court was perfected by plaintiff and defendant has assigned cross error.

Plaintiff's claim to be reimbursed for the cost of paving the four street intersections is based upon certain ordinances passed by plaintiff, a municipal corporation, and accepted by defendant. An ordinance passed May 11, 1892, permitted defendant to operate a double track street railway across the intersections of 47th street with Grand boulevard and Michigan avenue, on condition that the defendant should pave the space between its rails and for 12 feet on each side of the outer rails of said tracks with granite blocks,

SEAL. I I I S

TO THE CHAIRMAN

CHURCH, J. H. & SONS, INC.
Applicant.

[illegible]

100-443886-100

For a full and complete statement of the facts, see the report of the

INVESTIGATION OF THE EFFECTS OF THE

The cost of living and separating the two street and boulevard

1. The first of these is the fact that the

At 47th Street and Broadway

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the case was tried by the court and on 1 July

and a photograph was taken in front of the building for the

sum of \$1,075.00, being the amount expended by Plaintiff for

paying and retaining the insurance of both street and

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THE UNIVERSITY OF CHICAGO LIBRARY

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-the norm based on a collection of the results and a set of criteria to

John O'Connell, President of the National Association of Manufacturers, said that the bill would "put the government in the position of being able to control the production of goods and services, and to allocate them as it sees fit."

THE REPRODUCED BY THE NATIONAL ARCHIVES, COLLEGE PARK, MARYLAND

Particular defendant is interested in double check street lighting

Boxer & Intercession of 47th Street with 1st Avenue

and likewise, it is essential that the defendant should

have the space between its tails and tail is free on each

and that defendant should also pave the entire driveway of the intersection with granite or brick paving blocks at any time when directed by plaintiff. This ordinance among other things provided that the permission granted thereunder was revocable at any time by plaintiff.

The ordinance passed June 8, 1898, permitted defendant company to lay down its tracks and operate its street railway along 35th street and across Michigan avenue and South Park avenue, the two latter being boulevards under the control of plaintiff. Section 2 of this ordinance provided:

"The roadway shall be placed in perfect order and condition at the expense of said Chicago City Railway Company and to be so kept by it at all times in such manner as shall be directed by the superintendent of the South Park Commissioners, and * * * said Railway company shall pave the space between the rails and on each side of its tracks extending to the curb and cross walks * * * with granite blocks or such other material as the South Park Commissioners may determine and direct; * * * and shall maintain such pavement in good condition."

Other sections of the ordinance regulate the use of the intersections by defendant, and in Section 8 it was provided that "the permission hereby granted is subject to such further order or other restrictions as the South Park Commissioners, or their successors, may from time to time deem advisable." Section 12 of the ordinance provided that the ordinance was to be in force from and after its written acceptance by defendant. The defendant accepted this ordinance in writing the day after its passage.

On October 4, 1906, the plaintiff passed an ordinance under which the defendant company was permitted to operate its street railways across the intersection of South Michigan avenue and 22nd street. This ordinance provided that the permission granted to defendant was "to be subject to such further and other restrictions as the commissioners may from time to time deem advisable." Paragraph 2 of section 2 of the

ordinance provided that the defendant when so directed was to pave the entire surface of each boulevard intersection under the control of plaintiff and crossed by defendant's tracks with material and in a manner indicated by plaintiff, and maintain said intersections in good condition and repair to the satisfaction of plaintiff.

The ordinance also provided that in case defendant "should at any time fail or neglect to make the repairs ordered by the said commissioners within the time and in the manner named by said commissioners, said commissioners may immediately without notice proceed to make such repairs and said company shall pay said commissioners the cost thereof on demand."

In compliance with the express requirements thereof the defendant accepted this ordinance in writing on October 6, 1906, in which acceptance the defendant agreed to do and perform each and all of the matters and things required of it by the ordinance. Notwithstanding its written acceptance of the ordinances in question and its use of the privileges conferred by them, the defendant company insists that it is not liable to plaintiff for the costs incurred by plaintiff in paving and repairing the intersections in question.

In considering the questions presented by this appeal it should be constantly kept in mind that we are dealing with ordinances which express the terms of contracts between the parties and under which the defendant has laid down its tracks and operated its railway lines across certain boulevards under the control of plaintiff. The facts involved in the case are not in dispute. The defendant company had a prior right, under certain ordinances passed by the City Council of the City of Chicago, to operate, and prior to October 4, 1906, it was operating, cars on tracks laid down

ordinance provided that the defendant when so directed was to have the entire surface of each highway intersection under the control of plaintiff and crossed by defendant's tracks with gates, and in a manner indicated by signs, and maintain said intersections in good condition with regard to the satisfaction of plaintiff.

The ordinance also provided that in case de-

endant should at any time fail or neglect to make the repairs required by the said ordinance within the time and in the manner named by said ordinance, said ordinance may immediately be enforced by the city and the cost thereof and said expense shall be paid by defendant the cost thereof to be paid.

In compliance with the above ordinance defendant there- of the defendant accepted this ordinance as being in effect and, first, in which acceptance the defendant agreed to do and perform each and all of the matters and things required of it by the ordinance. Notwithstanding its written acceptance of the ordinance in question and its use of the privileges con- tained by same, the defendant hereby insists that it is not liable to plaintiff for the costs incurred by plaintiff in having and retaining the intersection in question.

In considering the questions presented by this appeal it should be observed that in which case we are deal- ing with ordinances which express the terms of contracts be- tween the parties and which with the defendant has into down the tracks and crossed the railway lines without certain condi- tions under the contract of plaintiff. The facts involved in the case are not in dispute. The defendant company had a prior right, under certain ordinances passed by the city Council of the City of Chicago, to operate, and operate to operate & 1905, if the ordinance, case by statute with down

on certain of the streets in question. The right of the defendant to operate cars in 22nd street was acquired before Michigan avenue passed as a boulevard under the control of plaintiff. It also seems to be conceded that plaintiff, since the year 1898, has not had control of 35th street between the west line of Michigan avenue and the lake, except as to the intersection of said 35th street with Michigan avenue and South Park avenue.

In Chicago City Railway Co. v. South Park Commissioners, 257 Ill. 602, it was held that the city had the sole power to authorize the construction of a street railway line along a public street and across boulevards under the jurisdiction of park commissioners, and that while such commissioners had no power to prohibit the use of such intersections for street railway purposes, they did have the power to impose such reasonable restrictions as would tend to preserve the use of the intersections for boulevard purposes; that the restrictions must be reasonable and made with a due regard to the rights of the commissioners and the company, and that the commissioners could not, by imposing unreasonable restrictions, prevent the construction of street railway lines across boulevards and thereby do indirectly what they could not do directly. This case does not go to the extent of permitting a street railway company to cross boulevards and pleasure driveways within the jurisdiction of the commissioners without the consent of such commissioners; and it is therein very clearly laid down that the commissioners have the power to impose reasonable restrictions upon railway companies who propose to occupy such intersections with street railway tracks.

In the instant case, however, we have facts essentially different from those before the Supreme court in

on certain of the streets in Chicago. The right of the defendant to operate cars in such street was established before Michigan Avenue passed as a boulevard under the control of the Board of Public Works. It also seems to be conceded that Plaintiff, since the year 1887, has not had control of 35th Street between the east line of Michigan Avenue and the lake, except as to the intersection of said 35th Street with Michigan Avenue and North Park Avenue.

In Chicago City Railway Co. v. Board of Public Works, 125 Ill. 402, it was held that the city had the sole power to authorize the construction of a street railway line along a public street and across boulevards under the jurisdiction of park commissioners, and that while such commissioners had no power to prohibit the use of such intersections for street railway purposes, they did have the power to impose such reasonable restrictions as would tend to preserve the use of the intersections for boulevard purposes; that the restrictions must be reasonable and made with a due regard to the rights of the commissioners and the company, and that the commissioners could not, by imposing unreasonable restrictions, prevent the construction of street railway lines across boulevards and thereby do indirectly what they could not do directly. This case was not so far extended as permitting a street railway company to cross boulevards and private driveways within the jurisdiction of the commissioners without the consent of such commissioners; and it is therein very clearly laid down that the commissioners have the power to impose reasonable restrictions upon railway companies and groups to occupy such intersections with street railway tracks.

In the instant case, however, we have found essentially different from those before the supreme court in

the case cited. Here the parties themselves have assumed to determine what restrictions would or would not be reasonable under the circumstances. The ordinances passed by the plaintiff permit the use of the boulevard intersections, but under restrictions which the defendant company expressly agreed to.

The evidence does not show, nor is it argued that plaintiff had denied to defendant the right to operate its railway lines at the points in question. While the ordinances seem to contain provisions which in the absence of an agreement could not be imposed upon defendant, and while also there may be some question as to the right of plaintiff, without sufficient cause, to revoke permission granted by the ordinances and to compel the defendant to cease to operate its railway lines at the intersections, many of the restrictions of and the obligations imposed by the ordinances cannot be said to be in fact unreasonable. But where, as in this case, the parties interested have agreed upon the terms upon which street railway lines are to be constructed and operated at certain places, the courts will not interfere unless it appears that the execution of the contracts was the result of duress, or where the terms and restrictions imposed are manifestly so unreasonable as to shock one's sense of justice and fairness.

It is insisted that the defendant company had no power under its charter and the laws of the State to enter into a contract with plaintiff to improve and maintain the intersections in question; that this duty rests upon plaintiff and that it cannot shift the burden thereof to defendant; that the defendant had no power to assume such obligations except as it may be imposed by the City of Chicago in consideration of a grant by the city of the right to occupy and use the city streets.

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the defendant had no power to assume such obligations except

as it may be imposed by the city of Chicago in consideration

of a grant by the city of the right to occupy and use the city

streets.

In the case cited, Chicago City Railway Co. v. South Park Commissioners, 257 Ill. 602, it was held that the plaintiff had no power to authorize or prohibit the use of street or boulevard intersections, but that it did have the power to impose reasonable restrictions upon a public service corporation which desired to make use of them. The act which created the Board of South Park Commissioners provided in substance that the Board was to have exclusive control "to manage and direct said park * * * and generally in regard to said park they shall possess all the power and authority now by law conferred upon or possessed by the common council of the city of Chicago in respect to public squares and places in said city." (Private Laws of Illinois, 1869, vol. 1, page 364). This act was amended in 1879 as follows:

"Such park boards shall have the same power and control over the parts of streets taken under this act as are or may be by law vested in them of and concerning the parks, boulevards or driveways under their control."

(Hurd's Revised Statutes Ill. 1916, ch. 105, p. 1850.)

The cases decided by the Supreme court, in which questions as to the power of the South Park Commissioners were involved, generally hold that the control of plaintiff over the boulevards is the same as that of the City of Chicago over the streets and other public places in the city. McCormick v. South Park Commissioners, 150 Ill. 516, at 522-28; Barber Paving Co. v. Park Commissioners, 233 Ill. 362, 365; People v. South Park Commissioners, 221 Ill. 522.

In the case of Chicago City Railway Co. v. South Park Commissioners, supra, it was held that the city's control of intersections did not include the power to disregard their uses and purposes as parts of the park system,

In the case cited, Chicago City Railway Co. v. South Park Commissioners, 255 Ill. 515, 83 Ill. App. 2d 101, it was held that the plaintiff had no power to interfere or restrict the use of streets for highway or other purposes, but that it did have the power to impose reasonable restrictions upon a public use view not creation which resulted in such use of them. The act which created the Board of South Park Commissioners provided in substance that the Board was to have exclusive control "to manage and direct said park" and generally in regard to said park. This Board was given the power and authority to make rules and regulations for the use of the park and to enforce the same by law. The Board is charged with the duty to manage and direct the park in accordance with the laws of Illinois. (Illinois Laws of 1909, vol. 1, page 384). This act was amended in 1915 as follows:

"Such park boards shall have the same power and control over the use of streets under this act as are or may be by law vested in them at and after the date of the passage of this act."

(Amended Statutes Ill. 1915, ch. 10, p. 125.)

The cases decided by the Supreme Court in which questions as to the power of the South Park Commissioners were involved, especially held that the control of plaintiff over the highways is the same as that of the City of Chicago over the streets and other public places in the city.

Chicago v. South Park Commissioners, 150 Ill. 515, 83 Ill. App. 2d 101; Chicago v. South Park Commissioners, 255 Ill. 515, 83 Ill. App. 2d 101; Chicago v. South Park Commissioners, 255 Ill. 515, 83 Ill. App. 2d 101.

In the case of Chicago City Railway Co. v. South Park Commissioners, supra, it was held that the City's control of intersections did not include the power to restrict their use and purposes as part of the park system.

and while this case holds that plaintiff had no power to prevent the use of such intersections by defendant, it, plaintiff, did have ample authority to impose reasonable restrictions upon such use. Stated differently, it may be said that the defendant company had no right under the law to occupy and use the intersections in question in disregard of such reasonable restrictions as plaintiff might impose. Both the City of Chicago and South Park Commissioners are municipal corporations, created by the sovereign power of the State for the purpose, inter alia, of controlling and governing the use of streets, highways and public places in the interest of the whole people. Where highways under the exclusive control of each of these public agencies cross and intersect each other, the jurisdiction and control of such intersection resides within the joint jurisdiction of such corporations, and the duty of each is to so exercise its jurisdiction therein as not unreasonably to interfere with the purposes which the legislature evidently had in mind when control of the streets, highways and public places was separately vested in these governing agencies, and it is our opinion that, even in cases where no valid contract ordinance is involved, the plaintiff has the right, where a street railway company refuses to comply with reasonable restrictions, to prevent its use of intersections under plaintiff's jurisdiction.

Much evidence was introduced on the trial which tended to prove that the restrictions imposed upon defendant, and which it agreed to accept and perform, were unreasonable. Witnesses testified in substance that the operation of heavy street cars over tracks on paved streets and the use thereof by heavily loaded wagons, the traffic of which used, to some extent that part of the street occupied by the track, tended

and while this case holds that Plaintiff had no power to pre-
vent the use of such information by defendant, it, how-
ever, did have such authority to impose reasonable restric-
tions upon such use. Stated differently, it may be said that
the defendant company had no right under the law to occupy and
use the information in question in disregard of such reason-
able restrictions on Plaintiff's right to use, when the right of
Plaintiff and such other persons are involved. Con-
sider, created by the sovereign power of the State for the
purpose, inter alia, of controlling and governing the use of
aircraft, aircraft and public places in the interest of the
public peace. Where aircraft under the exclusive control of
such of these public agencies exist and interest such other
the jurisdiction and control of such interested parties
within the joint jurisdiction of such corporations, and the
duty of each is to exercise its jurisdiction within its respec-
tively to interfere with the purpose which the legisla-
ture evidently had in mind when control of the aircraft, air-
ways and public places was separately vested in them. Govern-
ment, and it is our opinion that, even in cases where no
valid contract obligation is involved, the Plaintiff has the
right, where a street railway company refuses to comply with
reasonable restrictions, to prevent the use of information
under Plaintiff's jurisdiction.

Such evidence was introduced as the trial which
tended to prove that the restrictions imposed upon defendant
and which it agreed to accept and observe, were reasonable
and were justified in defendant's interest and the operation of heavy
street cars over roads so paved and crowded and the danger
by heavily loaded vehicles, the traffic of which would, to some
extent, tend to the street covered by the tracks, tend to

to disintegrate the paving. Other evidence was to the effect that heavy street traffic seeks the tracks in the street and that in turning out therefrom the street paving outside of the rails becomes worn and broken. These questions were disputed matters of fact in the trial court. The trial judge was evidently of the opinion that the paving restrictions imposed by the ordinances, under the circumstances, bore a reasonable relation to the benefits secured by the defendant under the ordinances.

In City of Chicago v. Newberry Library, 224 Ill. 330, it was held that the city had no power to compel abutting property owners to pay for the paving of a street which a street railway was bound to pay under the terms of an ordinance which was accepted by the company, and it was therein held that "while the contract remains in force the city could not provide for making the same improvements, although with different material, at the expense of the property owners."

We have been referred to other decisions in other States which sustain the contention that ordinances requiring street railway companies to pave and maintain roadways throughout the entire width are reasonable and valid. Borough of Rutherford v. Hudson River Traction Co., 73 N. J. L. 227; Philadelphia v. Ridge Avenue Passenger Ry. Co., 143 Pa. St. 444; City of Philadelphia v. Thirteenth and Fifteenth Streets Passenger Railway Co., 160 Pa. St. 269. In the case at bar, however, the parties agreed to the terms and conditions of the ordinance.

In Kuehner v. City of Freeport, 143 Ill. 92, the Supreme court held that whether a railway should pay for paving between its tracks, as is sometimes done, less or more, rests in the discretion of the municipal authorities; and in

to obstruct the paving. Other witnesses were to the effect that heavy street traffic would be caused by the street being closed for a long time. These witnesses were also to the effect that the street paving would be delayed by the street being closed. The city judge was satisfied of the opinion that the paving restrictions imposed by the ordinance, under the circumstances, were a reasonable relation to the benefits secured by the defendant under the ordinance.

In City of Chicago v. Peabody Library, 224 Ill. 230, it was held that the city had no power to compel a property owner to pay for the paving of a street which a street railway was bound to pay under the terms of an ordinance which was adopted by the company, and it was therein held that "while the ordinance remains in force the city could not provide for making the same improvements, although with different material, at the expense of the property owners." We have been referred to other decisions in other states which sustain the contention that ordinances requiring street railways to have and maintain to provide for the use of the city with the ordinance and valid. Johnson v. Indianapolis v. City of Indianapolis, 125 Ind. 444; Indianapolis v. City of Indianapolis, 125 Ind. 444; Indianapolis v. City of Indianapolis, 125 Ind. 444; Indianapolis v. City of Indianapolis, 125 Ind. 444. In the case of Indianapolis v. City of Indianapolis, 125 Ind. 444, however, the parties agreed to the terms and conditions of the ordinance.

In Indianapolis v. City of Indianapolis, 125 Ind. 444, the supreme court held that a railway should pay for paving between its tracks, as is sometimes done, less or more, to the extent of the municipal authorities; and in

deciding the case of Madison v. Alton Traction Company, 235 Ill. 352, the court said:

"Other cases might be cited where the provisions of ordinances requiring railroad companies occupying streets to pave and keep in repair certain portions of the streets have been sustained, and we have been referred to no case where they have been held invalid or not binding on the city and the railway company."

If it be conceded that the city and the plaintiff had the joint control and management of the intersections in question, it follows as a necessary consequence of this control that each municipality had the power, even without consent, to reasonably regulate the use of such intersections. Where, however, as in the instant case, the restrictions imposed are embodied in a contract to which both parties assent, the courts, in the absence of very clear evidence to the contrary, will assume that the provisions of the contract are reasonable. Chicago General Ry. Co. v. City of Chicago, 176 Ill. 253; Byrnes v. Chicago General Ry. Co., 169 Ill. 75.

The authority last cited holds that a municipal corporation by contract ordinance may impose upon public service corporations conditions and restrictions which would be invalid if required by a municipality in the exercise of its governmental function; and in Chicago City Railway Company v. South Park Commissioners, supra, the Supreme court said:

"The commissioners and the company being unable to agree as to proper and reasonable conditions, it became the province of the court to determine whether the conditions sought to be imposed were reasonable or unreasonable."

In City of Springfield v. Central Union Telephone Co., 184 Ill. App. 400, it was held -

"The question of the reasonableness of the grant was for the parties to decide. If the grantees in the ordinance were not satisfied with its terms they should have refused to accept it. * * * Having chosen to accept the ordinance with all of its terms, they are bound by it."

While we think there is force in the contention that the defendant is estopped by its acceptance of the or-

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"Other cases arise in which the provision of assistance is within the scope of certain portions of the law, and we have been referred to the city and the city has been held liable for the same."

It is noted that the city and the State of New York

and the first step was to determine the nature of the information that was being sought.

question. It follows that we should not expect any

and the responsibility has the power, even without con-

...to the ... of the ...

There is no doubt that the above information is correct.

posed in a hospital in a contract to which both parties re-

1. The purpose of this study is to determine the effect of the use of the word "and" on the comprehension of a sentence.

It is further stated that the provisions of the contract

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The majority of the cases are reported to be of the following type:

certification by contract of purchase and delivery

also mentioned conditions of restriction which would be in-

which is required by a number of the

[illegible]

the future court will:

"The...listeners and the company...unable to
agree as to proper and reasonable provisions, it became the
province of the court to determine whether the conditions
ought to be treated were reasonable or unreasonable."

[illegible][illegible]

"The question of the responsibility of the front line for the failure to achieve it in the practice in the circumstances was not settled with the same way should have refused to accept it. It is having chosen to accept the responsibility with all the terms, they are bound by it."

While we think there is force in the contention

that the defendant is stopped by the acceptance of the or-

dinances in question and by full performance and compliance of plaintiff with their requirements, we are of the opinion that the contract was not ultra vires either of plaintiff or defendant.

In Chicago General Railway Co. v. City of Chicago, 176 Ill. 253, the court said:

"We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract."

Byrnes v. General Railway Co., 169 Ill. 82; Commonwealth Electric Co. v. Rose, 214 Ill. 545; People v. Suburban R.R. Co., 178 Ill. 606.

The evidence shows that the defendant for some years recognized the binding force of the contract which it entered into with the plaintiff. It paved many boulevard and street intersections for their entire width. The passage and acceptance of the ordinances in question and performance under them by both plaintiff and defendant rendered the transaction binding upon both parties thereto. There is ample reason based upon authority for a holding that certain of the terms and conditions imposed by the contracts were not in fact unreasonable. Other requirements of these ordinances, and in particular those which required the defendant to pave intersections distant from and not connected with intersections involved herein, might be regarded as unreasonable in the absence of acceptance thereof by the defendant.

The defendant bases its defense in part upon

business in question and by will performance and compliance of plaintiff with their regulations, we are of the opinion that the contract was not ultra vires subject of plaintiff's contract.

In Chicago General Railway Co. v. City of Chi-

cago, 174 Ill. 283, the court said:

"We are also of the opinion that even though it might be held that the condition upon which the contract was made was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been adopted by the city, the condition attached, whether thereby to contract with the condition attached, it would be void. But if it becomes a valid contract between it and the city, the validity of which the defendant is now disputing, the fact of the city in imposing the condition cannot be treated as a condition precedent or a condition by statute, and valid, and therefore, having accepted the contract in its entirety and waived the benefit for which it was made to pay the amount provided, it cannot now repudiate that contract."

Myrtle v. General Railway Co., 189 Ill. 52; Union

Electric Co. v. City of Chicago, 189 Ill. 52; Chicago

Co., 174 Ill. 283.

The evidence shows that the defendant for some

years recognized the binding force of the contract and it entered into with the plaintiff. It paved many highways and other infractions for their entire rights. The law and acceptance of the ordinance in question and performance under them by both plaintiff and defendant together the transaction is a valid contract. There is no reason to doubt that the plaintiff for a building that certain of the terms and conditions imposed by the contract were not in fact unreasonable. Other representations of these conditions and in particular those which regulated the defendant to pay interferences against him and not connected with interferences involved therein, might be regarded as unreasonable in the absence of evidence to the contrary.

The defendant bears its burden in this case.

the case of Chicago City Ry. Co. v. South Park Commissioners, supra. Under this decision the defendant was not required to assent to any unreasonable conditions or restrictions. At the time the ordinances were passed and accepted it was a matter of uncertainty as to what restrictions might be imposed by plaintiff. The defendant saw fit to agree with plaintiff as to the terms and conditions of the ordinances and what was therefore uncertain became thereby certain. This fact furnished a sufficient legal consideration for the making of the contracts. The passage of the ordinances of 1907 by the City Council of the City of Chicago could not have had the effect of releasing the defendant from its prior obligations to plaintiff.

The plaintiff performed the work which was required of defendant under the contract at the intersections referred to. The evidence shows that the total reasonable cost of this work was \$4,097.08.

. The judgment of the Municipal Court will be reversed and judgment entered here in favor of the plaintiff for the sum of \$4,097.08.

REVERSED AND JUDGMENT HERE.

The case of Chicago City Ry. Co. v. South Park Commissioners, 1897, 119 Ill. 400, 1 N.E. 271, 18 L.R.A. 101, 34 Am. St. Rep. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The plaintiff performed the work which was required of defendant under the contract at the intersection referred to. The evidence shows that the total reasonable cost of this work was \$4,087.08. The judgment of the plaintiff should be reversed and judgment entered here in favor of the plaintiff for the sum of \$4,087.08.

REVERSED AND JUDGMENT HERE.

CHARLES B. NELSON,
Appellee,

vs.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

OSCAR BRODFUEHRER et al.
On Appeal of OSCAR BRODFUEHRER.

211 I.A. 396

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Superior Court appointing a receiver.

~~The bill of complaint filed in the cause charged~~
~~in substance that complainant had recovered a judgment against~~
~~the defendant, Oscar Brodfuehrer, for the sum of \$265, it~~
~~charges the issuance and return nulla bona of an execution~~
~~and that said defendant was the owner of real estate, or of~~
~~an interest therein, and of certain personal property; that~~
~~the wife of defendant, who was also made a party defendant,~~
~~held legal title to the property which was in fact the prop-~~
~~erty of defendant. The bill sought discovery of the defend-~~
~~ants, who filed answers denying in general terms the material~~
~~allegations of the bill. On a preliminary hearing the court~~
~~ordered the appointment of a receiver, upon the complainant~~
~~and receiver giving bonds in accordance with the statute.~~
~~order defendant appeals.~~
It is insisted for the defendant, the judgment debtor, who brings the case here for review, that the bill of complaint is not properly verified. The bill is verified by the complainant himself and also by his agent, and while the verification of complainant seems to have been attached to the bill, in compliance with an order of court, after it was filed, we think the bill was sufficiently verified.

CHARLES E. KILPATRICK
Appellee

vs.

OSCAR HENRIKSSON et al.

On Appeal of OSCAR HENRIKSSON.

ATTORNEY GENERAL
OF NEW YORK

2111.A.396

THE JUSTICE DEPARTMENT HAS REVIEWED THE RECORD OF THIS CASE.

This is an appeal from an interlocutory order

of the Superior Court appointing a receiver.

The bill of complaint filed in the court charged
that the defendant, Oscar Henriksson, for the use of \$250,000,
in substance, had recovered a judgment against

the defendant, Oscar Henriksson, for the use of \$250,000,
charges the interest and return of the same.

and that said defendant was the owner of real estate, or of
an interest therein, and of certain personal property; that

the wife of defendant, who was also a party defendant,
held legal title to the property which was in fact the prop-

erty of defendant. The bill sought discovery of the defend-
ant, who filed answers denying in general terms the material

allegations of the bill. On a preliminary hearing the court
ordered the appointment of a receiver, upon the complaint

and receiver giving bonds in accordance with the statute.
It is insisted for the defendant, the judgment

debtor, who brings the case here for review, that the bill of
complaint is not properly verified. The bill is verified by

the complainant himself and also by his wife, and while the
verification of complaint seems to have been obtained to

the bill, in compliance with an order of court, after it
was filed, as when the bill was suitably verified.

The point is made that the bill was unsigned at the time it was verified by the agent, and also when verified by complainant. No objection was made in the trial court, so far as the abstract of record shows, either by filing a demurrer or otherwise, to the sufficiency of the bill of complaint. The signature of complainant appears on the bill, and excepting the order referred to, nothing is shown as to when the bill was in fact signed. Answers were filed by the defendants and later on October 2, 1917, the court appointed a receiver for all of the defendant's, Oscar Brodfuehrer's, property except such as was exempt by law.

It is asserted that the receiver should not have been appointed for the reason that the answer filed by defendant definitely denied all the material allegations of fact of the bill, and it is insisted, on the authority of Salsbury v. Ware, 183 Ill. 505, that the bill should be dismissed for the reason that the sworn denial of defendants in their answer rendered the court powerless to appoint a receiver. We do not think that the case referred to is an authority in favor of the contention of defendant. That case merely indicates the amount of proof necessary to overcome a sworn answer where the answer is offered as proof upon a full hearing of the cause. The bill before us is a creditor's bill and it seeks a discovery of the assets and property owned by one of the defendants.

In Gage v. Smith et al., 79 Ill. 219, it was held that in cases of creditors' bills, where the existence of a judgment against a debtor and the return of execution unsatisfied are alleged, and it is also alleged, on information and belief, that the defendant has property, exclusive

The point is made that the bill was amended at the time it was verified by the agent, and also when verified by complainant. No objection was made in the trial court, so far as the abstract of record shows, either by filing a demurrer or otherwise, to the sufficiency of the bill of complaint. The signature of complainant appears on the bill, and executing the order referred to, nothing is known as to when the bill was filed. Answers were filed by the defendants and later on October 2, 1917, the court appointed a receiver for all of the defendant's, real, personal, property except such as was exempt by law. It is asserted that the receiver should not have been appointed for the reason that the answer filed by defendant definitely denied all the material allegations of fact of the bill, and it is insisted, on the authority of Salisbury v. Tate, 183 Ill. 303, that the bill should be dismissed for the reason that the sworn denial of defendant in their answer rendered the court powerless to appoint a receiver. We do not think that the case referred to is an authority in favor of the contention of defendant. That case merely indicates the amount of proof necessary to overcome a sworn answer where the answer is offered as proof upon a full hearing of the cause. The bill before us is a creditor's bill and it seeks a discovery of the assets and property owned by one of the defendants. In Case v. Smith et al., 72 Ill. 119, it was held that in cases of creditor's bills, where the existence of a judgment and that a debtor and the return of execution unsatisfied are alleged, and it is also alleged, on information and belief, that the defendant has property, exclusive

of all prior claims, which complainant is unable to reach by execution, an injunction would issue and a receiver be appointed almost as a matter of course.

The charge made in the bill is that the defendant and his wife are concealing assets belonging to the defendant. The receiver is authorized, under the order of appointment, to take possession of such assets of the defendant only as are not subject to exemption. The order appointing the receiver was interlocutory and he is vested with authority to preserve whatever property may come into his possession as such receiver, pending a final determination of the issues by the master to whom the cause was referred, and by the court.

The order directing the appointment of a receiver required the giving of a bond by the receiver as well as by the complainant. The abstract of record shows that a bond given by the receiver was approved on October 3, 1917, and that the bond of complainant was approved October 23, 1917. There is no means of determining from the abstract when the above bonds were filed. The subsequent approval of the bond given by complainant did not vitiate the appointment of the receiver. The appointment was to be effective only by compliance with the order which required the filing of a bond by the receiver as well as by complainant. Both bonds having been given in compliance with the order of court, the right of the receiver to act as such became, thereby, complete.

The interlocutory order of the Superior Court of October 2, 1917, is affirmed.

ORDER AFFIRMED.

of all other things, which consideration is made in terms of
the bill, an injunction would issue and a receiver be ap-
pointed as a matter of course.

The change made in the bill is that the defendant
and his wife are deemed to be acting in concert in the
the receiver is authorized, under the order of appointment,
to take possession of such assets of the defendant only as
are not subject to execution. The order appointing the re-
ceiver was interlocutory and as it related only to the
preservative matters properly and was not his possession of
such receiver, pending a final determination of the issues
by the master to whom the cause was referred, and by the
court.

The order directing the appointment of a receiver
required the filing of a bond by the receiver as well as by
the complainant. The receipt of record shows that a bond
given by the receiver was approved on October 2, 1917, and
that the bond of complainant was approved October 24, 1917.
There is no means of determining from the abstract when the
above bonds were filed. The subsequent approval of the bond
given by complainant did not vitiate the appointment of the
receiver. The appointment was to be effective only by com-
pliance with the order which required the filing of a bond
by the receiver as well as by complainant. Both bonds having
been given in compliance with the order of court, the rights
of the receiver to act as such receiver, thereby, complete.

The interlocutory order of the Superior Court
of October 2, 1917, is affirmed.

ORDER AFFIRMED.

EDWARD STEER,
Appellee.

viii.

JULIUS OPPENHEIMER, doing business
as J. Oppenheimer and Company,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 397

Plaintiff brought suit and obtained judgment for \$489.06 in the Municipal court against the defendant for rent for the use of premises in Chicago from December 29, 1915, to February 29, 1916. Defendant appeals the cause to this court.

The defendant took possession of the premises on December 29, 1914, under a lease for a term ending April 29, 1915. He held over as tenant under the lease for two 4-month terms, the last of which ended December 29, 1915. The lessor under the original lease was one Edward Warhoefer.

The principal matter in dispute between the parties is as to whether the defendant was a lessee of the premises subsequent to December 29, 1915. It is a much disputed question of fact whether the defendant had abandoned the premises prior to December 29, 1915. It is conceded that certain articles which had been in the possession of defendant were in the premises after that date. The defendant's contention is that the articles left in the premises were not of great value, that they were not owned by him but were the property of persons who had loaned them to him. We think that his possession of the articles referred to, at and prior to December 29, 1915, even though he had no legal title thereto, gave him such control and proprietary interest therein as made it his right, and perhaps his duty, to preserve this property, and his occupation of the premises in question for this purpose must be held to be a use of the premises for his

REAR END

1911

VS.

THE CHIEF OF POLICE, CITY OF CHICAGO, vs. J. J. COUGHLIN and others, Defendants.

ALL AT THE CHIEF OF POLICE, CITY OF CHICAGO.

211 A. 387

ED. COUGHLIN, CHIEF OF POLICE, CITY OF CHICAGO.

Plaintiff brought suit and obtained judgment for \$425.00 in the municipal court against the defendant for rent for the use of premises in Chicago from December 22, 1910, to January 20, 1911. Defendant denies the truth of this claim. The defendant took possession of the premises on

December 22, 1910, under a lease for a term ending April 30, 1911. He paid over to tenant under the lease for the 4-month term, the sum of \$425.00 on December 22, 1910. The lease under the original lease was the same as the one in

The principal matter in dispute between the parties is as to whether the defendant was a lessee of the

premises subsequent to December 22, 1910. It is a well established question of fact whether the defendant had abandoned

the premises prior to December 22, 1910. It is contended that the premises which had been in the possession of the defendant

were in the hands of the defendant after that date. The defendant's contention is that the premises were not of

great value. That they were not used by him but were the property of the defendant who had leased them to him. He claims that the

possession of the premises referred to, was given to the defendant on December 22, 1910, when he had no other place to go.

He gave him such control and possession to that extent as to make it his right, and because the same, to preserve this

property, and his possession of the premises in question for this purpose must be held to be a use of the premises for his

benefit.

There is, however, a controlling fact shown by the evidence which leaves the question of defendant's relation to the premises in question after December 29, 1915, without much doubt. The evidence tends to prove that defendant attempted to rent the premises to Wolffs Bros. prior to December 29, 1915. It satisfactorily appears that he did in fact sublet the premises to them after that date and that he received as rental therefor the sum of \$400. The defendant attempted to take the position on the trial that the person who made out the receipt for this payment, one Wager, a clerk employed by defendant, had no authority to do so. The defendant admits, however, that he took the check for \$400.00 and deposited it to his account, although at the trial he was unable to tell why or on what account he received this money, and he testified: "I took it because he handed it to me; that is all there is to it."

A point is made that error was committed by reason of the ruling of the trial Judge excluding a deed which it is claimed would show a transfer of the title in fee to the premises to Jacob Wolffs, a member of the firm of Wolffs Bros. This partnership consisted of three members. Neither Jacob Wolffs nor the firm of Wolffs Bros. make any claim at all to any interest or right accruing to them, or either of them, under this deed. So far as this record is concerned, there can be no question made by the defendant here as to the right of the lessor and his assigns to the rents accruing under the lease. The defendant's contention is that he surrendered the premises to the owner of the fee. There is no merit at all in this contention. As a matter of fact the great preponderance of the evidence shows that the defendant at no time attempted to

testimony.

There is, however, a contradiction that shows by the evidence which leaves the question of defendant's relation to the premises in question after December 20, 1915, without much doubt. The evidence tends to prove that defendant attempted to rent the premises to Willie Bros. prior to December 20, 1915. It satisfactorily appears that he did in fact violate the premises to some extent that date and that he received an rental therefor the sum of \$400. The defendant attempted to take the position on the trial that the person who made out the receipt for this payment, one [redacted], a clerk employed by defendant, had no authority to do so. The defendant admits, however, that he took the money for \$400.00 and deposited it in his account, although at the trial he was unable to call any on an what account he received this money. and he testified: "I took it because he asked it in my; that is all there is to it."

A point is made that this was committed by reason of the ruling of the trial judge excluding a fact which it is claimed would show a transfer of the title in the premises to Willie Bros. This partnership consisted of three persons, neither having title nor the title of Willie Bros. was any of them at all so any interest or right meaning to them, or either of them, under this lease. As far as this record is concerned, there can be no question made by the defendant here as to the right of the [redacted] and his associates in the [redacted] under the lease. The defendant's contention is that he surrendered the premises to the [redacted] of the [redacted]. There is no merit at all in this contention. As a matter of fact the great preponderance of the evidence shows that the defendant at no time intended to

surrender possession of the premises to Jacob Wolffs or to Wolffs Bros. The evidence is practically conclusive that he dealt with them and recognized them as his subtenants. Under the circumstances we think the trial court was right in excluding the deed. There is no force in the argument that the firm of Wolffs Bros. may have acquired an interest in the premises in question as owners through the deed to Jacob Wolffs, their assumed trustee. A member of this firm testified in the Municipal court that the firm was a subtenant of the defendant.

The plaintiff is entitled to interest on his claim. As we view the record, the defendant's position is untenable both in law and in fact. The delay in paying the rent was, to say the least, vexatious. The case involves more than the matter of mere delay; it was a refusal to pay rent for reasons which the evidence shows were resorted to for the sole purpose of delaying or defeating a just and meritorious claim.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

entire possession of the premises to Jacob Wolff or to
Wolff's son. The evidence is practically conclusive that
he dealt with him and recognized him as his nephew.
Under the circumstances as shown the trial court was right
in excluding the deed. There is no force in the argument
that the time of title was, may have occurred an interest
in the premises in question as shown through the deed to
Jacob Wolff. Their assumed trustee. A number of this firm
testified in the Municipal court that the firm was a sub-
sistent of the defendant.

The plaintiff is entitled to interest on his
claim. As to view the record, the defendant's position is
untenable both in law and in fact. The delay in paying the
rent was, to say the least, vexatious. The case involves
more than the matter of mere delay; it was a refusal to pay
rent for reasons which the evidence shows were resorted to
for the sole purpose of delaying or obtaining a just and
meritorious claim.

The judgment of the Municipal court will be

affirmed.

APPROVED.

GEORGE HUTTON,
Appellee.

vs.

ALBERT MILLER and E. F.
MILLER, copartners, doing
business as Albert Miller
& Company,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 399

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of plaintiff, George Hutton, for the sum of \$198.73.

The evidence introduced on the trial tends to prove that the plaintiff, a resident of Elkhorn, Wisconsin, in November, 1915, through his agent, R. J. McCabe, who was a brother-in-law of plaintiff, shipped two carloads of hay to defendants, who were engaged in a commission business in Chicago as Albert Miller & Company. R. J. McCabe had two bills of lading made out for the shipment, in which the name of the plaintiff appeared as the shipper of the hay. At the time of this transaction Andrew McCabe, a brother of R. J. McCabe, was conducting a hay brokerage business in Elkhorn, and he for some time had had business relations with defendant. R. J. McCabe delivered the bills of lading to Andrew McCabe with the request that they be sent to defendants. On November 24th Andrew McCabe sent the bills of lading to defendants and at the same time sent them the following letter:

"Elkhorn, Wis., 11-24-15.

Albert Miller & Co.

Sirs:

Car 74470 sent to you. Also car 103333. Call your attention to car 74470. This car is a very fine car of hay. All except about three tons at doors. Doors are bleached so sell those out and then sell the balance of car. It is good No. 1 Timothy hay. This has a sprinkle

CHICAGO, ILL.
COURT OF CHICAGO.

ALBERT MILLER and J. J.
LAWSON, Plaintiffs,
vs.
ALBERT MILLER and J. J.
LAWSON, Defendants.

998 A. 839

IN SENATE, JANUARY 1, 1914.

This is an appeal from a judgment of the Circuit
Court of Chicago in favor of Plaintiff, Albert Miller,
for the sum of \$108.75.

The evidence introduced on the trial tends to
prove that the Plaintiff, a resident of Chicago, Illinois,
in November, 1913, through his agent, R. J. Lebeda, who was a
brother-in-law of Plaintiff, secured two copies of his
defendant, who was engaged in a commission business in
Chicago as Albert Miller & Company. R. J. Lebeda had two
bills of lading made out for the shipment, in which the name
of the Plaintiff appeared as the shipper of the cargo. At the
time of this transaction Andrew Lebeda, a brother of R. J.
Lebeda, was conducting a dry brokerage business in Chicago,
and he for some time had had business relations with defendant.
R. J. Lebeda delivered the bills of lading to Andrew
Lebeda with the request that they be sent to defendant. In
November 1913 Andrew Lebeda sent the bills of lading to de-
fendant and at the same time sent the following letter:
"Chicago, Ill., 11-14-13.

Albert Miller & Co.

Dear Sirs: We have sent to you, also our 108833. Only your
attention to our 108833. This car is a very fine car of
1913. All except about three tons at about. Please see
attached to sell those and then will the balance of
it be sold by J. J. Lawson. This has a special

of clover. Poor hay at doors of this car also. So get into those cars. All we want is to get a fair deal.
Andrew McCabe."

On November 26, 1915, defendants acknowledged receipt of the bills of lading and also of the hay. Following this transaction Andrew McCabe sent other hay to defendants and drew drafts on them, which were honored. On December 15, 1915, the defendants, in a statement of account to Andrew McCabe, attempted to give him credit for the amount received by them on account of a sale of the hay in question, and on December 17th Andrew McCabe sent the following letter to defendants:

Albert Miller & Co.

"Elkhorn, Wis. 12-17-1915.

Sirs:

I enclose you draft and account on cars. You will notice that cars 74470 and car 103333 was shipped to you by George Hutton. So I have nothing to do with those two cars of hay. Send returns to George Hutton, Elkhorn, Wis.

Yours,

Andrew McCabe.

P. S. That balance due you will be made on some of my shipments."

It is insisted on behalf of the defendants that they had no knowledge at the time they received and sold the two carloads of hay that they were dealing with any person other than Andrew McCabe. It appears upon the face of the bills of lading which they received from him that the plaintiff, George Hutton, was the shipper of the goods in question. Andrew McCabe had done business with defendants both before and after the transaction in question, and they knew that he acted generally as the agent for farmers who through him had shipped hay to Chicago. It is not denied that the hay in question was owned and was in fact shipped by the plaintiff. The evidence shows that Andrew McCabe acted in the matter at the suggestion of R. J. McCabe and not by the express request of the plaintiff.

of clover. I don't say at all that I saw any clover. I saw
into these cars. If we want to see a fair trial.
"What's the matter?"

On November 26, 1913, defendant was arrested.

Receipts of the bills of lading and also of the way. I
found this transaction Andrew McCabe sent other way to de-
fendant and drew drafts on them, which were cashed. On
December 15, 1913, the defendant, in a statement of ac-
count to Andrew McCabe, attempted to give him credit for
the money received by him as payment of a bill of lading
in question, and on December 17th Andrew McCabe sent the
following letter to defendant:

WILKINSON, Wm. 12-17-1913.

Albert Miller & Co.

Sir: I enclose you draft and account of cash. You will
notice that cash \$44.00 and our 100.00 was shipped to
you by George Patton. As I have nothing to do with
these two cars of hay. Good returns to George Patton.
Sincerely,
Andrew McCabe.

P. S. What balance due you will be made on some of my
drafts.

It is insisted on behalf of the defendant that
they had no knowledge at the time they received and sold the
two carloads of hay that they were dealing with any person
other than Andrew McCabe. It appears upon the face of the
bill of lading which they received from him that the trans-
action, George Patton, was the owner of the goods in ques-
tion. Andrew McCabe had some business with defendant
both before and after the transaction in question, and they
knew that he acted generally as the agent for defendant and
through him had shipped hay to Chicago. It is not denied
that the hay in question was owned and was in fact shipped
by the plaintiff. The evidence shows that Andrew McCabe
acted in the matter at the suggestion of W. J. McCabe and
not by the express request of the plaintiff.

We do not think this case comes within the principles contended for by counsel for defendants. Under the facts shown by the record here it cannot be said that Hutton either "intentionally or negligently caused or permitted his agents to hold themselves out as the owners of the property." R. J. McCabe, who was in fact the agent of the plaintiff, had the bills of lading made out showing the shipper's name therein. His delivery of these bills to his brother with instructions to transmit them to defendant did not give Andrew McCabe such indicia of ownership to the property in question as would authorize the defendants to credit his account with the sum received from the sale of the hay.

In the instant case it does not appear that the money received from the sale of the hay was actually delivered to Andrew McCabe. An attempt was made to credit him with this amount and he promptly informed defendants of their error and called their attention to the fact that the hay was in fact the property of plaintiff.

In the case of Eyers v. Johnson County Savings Bank, 64 Ill. App. 168, a case in material respects similar to the instant case, it was said:

"It did not matter how the accounts were kept, if from the real circumstances a condition existed that stamped the transaction as one different from that which the account, as kept, might possibly be said to indicate. The real fact in such a case, when, as in this case, clearly proved, will control and prevail over the other theory, which the manner of keeping the accounts might tend to sustain. * * *

"But the only reasonable conclusion from the evidence, which can be arrived at under the law, is that the hogs were the property of the appellee from the moment of their purchase to that of their sale. And that being so, the law will forbid appellants, into whose possession the hogs came, although they bore the outward semblance of being Elliott's property, from appropriating them upon a pre-existing indebtedness of Elliott to them. * * *

"The appellants parted with nothing on their faith and belief that the property belonged to Elliott, excepting the freight and charges paid by them and their own services, and for all which they were reimbursed, as they properly were entitled to be, by deducting the same from the gross receipts for which they sold the hogs."

to do not think that even under the plain-
 elias contended for by counsel for defendant. Under the facts
 shown by the record here it cannot be said that Union either
 "intentionally or negligently caused or permitted the agents
 to hold themselves out as the owners of the property." N. J.
 McBride, who was in fact the agent of the plaintiff, had the
 bills of lading made out showing the shipper's name therein.
 his delivery of these bills to his brother with instructions
 to transmit them to defendant did not give Andrew notice such
 indicia of ownership to the property in question as would en-
 title the defendants to credit his account with the sum re-
 ceived from the sale of the hay.

In the instant case it does not appear that the
 money received from the sale of the hay was actually delivered
 to Andrew McBride. An attempt was made to credit him with this
 amount and he promptly informed defendants of their error and
 called their attention to the fact that the money was in fact
 the property of plaintiff.

In the case of Boyer v. Thompson County Savings
Bank, 64 Ill. App. 103, a case in which respect similar to
 the instant case, it was said:

"It did not matter how the accounts were kept,
 if from the real circumstances a confusion existed that
 attacked the transaction as one different from that which
 the account, as kept, might possibly be said to indicate.
 The real fact in such a case, when, as in this case, clearly
 proved, all control and prevail over the other theory,
 which the account of keeping the accounts might tend to sug-
 gest."

"And the only reasonable conclusion from the evi-
 dence, which can be arrived at under the law, is that the
 boys were the property of the appellee from the moment of
 their purchase to that of their sale. And that being so,
 the law will forbid the plaintiff, who never possessed the
 boys, from claiming any share in the proceeds of their
 sale. The plaintiff's property, which was sold, was a pre-
 existing independent right of plaintiff to them."
 "The appellee parted with nothing on their behalf
 and belief that the property belonged to plaintiff, who, being
 the plaintiff and charges paid by them and their own services,
 and for all which they were reimbursed, as they properly were
 entitled to be, by deducting the same from the gross proceeds

And it may be said here, as in the Byers case, supra, that the defendants had not in fact parted with anything of value because of their alleged belief that the hay in question was the property of Andrew McCabe. As against Hutton, the plaintiff, the defendants were, of course, entitled to their commissions and proper charges in connection with the sale of the hay. It was their duty to pay the net proceeds of the sale to the plaintiff, the owner of the property.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

and it may be said here, as in the other case,
that the defendant had not in fact parted with any-
thing of value because of which it might be said that the
in question was the property of Andrew Johnson, as alleged
by him, the plaintiff. The defendant would, of course, en-
dorse to their satisfaction and proper charges in connection
with the sale of the property. It was their duty to pay the net
proceeds of the sale to the plaintiff, the owner of the

PROPERTY.

KATHRYN J. McHALE,
Plaintiff in Error,

vs.

MARTIN J. McHALE,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 400

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for divorce against her husband, ~~Martin J. McHale~~, ^{the bill was filed} on the 4th day of October, 1915. The cause was tried before a jury and on November 16, 1917, the jury rendered a verdict in which it found the complainant not guilty of certain charges made against her in a supplemental cross bill filed by defendant, and found defendant guilty of extreme and repeated cruelty toward complainant and not guilty as to certain other charges made against him in the bill. The record discloses that a decree had been entered in the cause in favor of complainant on February 10, 1916. On March 2, 1916, the court entered an order in the following form:

"On motion of solicitor for defendant, motion to vacate and set aside decree continued to March 8, 1916."

The decree of February 10, 1916, was vacated March 20, 1916. On November 26, 1917, the court, on motion of defendant, set aside the verdict of the jury entered November 16, 1917, and ordered a new trial of the cause.

The complainant, Kathryn J. McHale, by this writ of error contends that the court was without jurisdiction to set aside the decree of the court entered of record on February 10, 1916, at the February term of the court, in that it appears that the order setting this decree aside was entered of record on March 20, 1916, being the March

term of the court.

Numerous authorities are cited to the effect that the trial court had no power to vacate, alter or amend its decree, except in matters of form, on a motion entered at a term subsequent to that at which the decree was entered. The law on this question is well settled, but on the record before us it does appear that a motion was made within the February term to vacate the decree in question. Counsel for defendant argue that if the order had contained the words "made and" or "entered and" between the words "decree" and "continued", the jurisdiction of the court to vacate the decree might have been retained. We do not think there is much force in this argument. It appears from an order of court entered within the term that a motion had been made during the term to vacate the decrees, and the order vacating the decree was entered March 20, 1916.

Although it is insisted that no motion to vacate the decree had ever been entered in the cause, we think the record conclusively shows to the contrary, and while the rules of the Superior court require that all motions not of course shall be made in writing, we are justified in assuming, in the absence of affirmative proof, that the parties had complied with the rules of the court at and before the time the order in question was entered.

The record shows the pendency of a motion to vacate the decree of March 2, 1916, and that this motion was continued for disposition to March 8, 1916. The order retained the jurisdiction of the court over the subject matter of the motion to the March term. The entry of the motion upon the record was sufficient notice to all concerned that such motion was pending and undisposed of.

Hartman v. Viera, 133 Ill. App. 216.

The court did not, as insisted upon, abuse its discretionary power in granting a new trial. A court of review will interfere with the action of a trial court in granting a new trial only in cases where it appears that manifest injustice has been thereby done.

We are unable to say from our examination of the evidence heard on the trial that the trial court erred in awarding defendant a new trial, even if it be conceded that this court has the power to review the action of the trial court on the motion for a new trial of the cause. The cause will be retried and we do not wish to make any comment upon the weight of the evidence heard on the trial other than to repeat that we are unable to say that the chancellor erred in ordering a new trial of the cause. The writ of error is dismissed.

WRIT OF ERROR DISMISSED.

The court has not, as indicated above, shown the
discretionary power in exercising a new trial. A court of
review will interfere with the action of a trial court in
exercising a new trial only in cases where it appears that
judicial infirmities had been seriously noted.
as the court is not free from consideration of
the evidence found on the trial and the trial court
error in exercising judgment a new trial, even if it be con-
ceded that this court had the power to review the action
of the trial court in the exercise of a new trial if the
court. The court will be treated as an act which is
not only concerned with the rights of the defendant, but
the trial court has no power to exercise a new trial if the
trial the exercise of it is not a new trial of the
case. The right of error is absolute.

THIS IS THE DECISION.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

WILLIAM O'DOWD,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 402

MR. JUSTICE McSWEELY DELIVERED THE OPINION OF THE COURT.

By an information filed in the Municipal Court it was charged that the defendant "did steal, take and carry away six cotton bed comforters of the value of nine dollars of the goods and chattels of," etc. Upon arraignment the defendant entered a plea of not guilty; trial by jury was waived and the cause was submitted for determination by the court. After the hearing of evidence defendant was found guilty "in manner and form as charged in the information herein." Later, on motion of the State's attorney for final judgment on the finding, it was adjudged by the court that the defendant "is guilty of the criminal offense of larceny"; he was sentenced to confinement at labor in the House of Correction for one year and fined five dollars. The cause is before us by writ of error for review.

The trial court made no finding as to the value of the property alleged to have been stolen, and, as held in People v. Ellison, 185 Ill. App. 287, whenever the measure or kind of punishment is dependent on the value of what has been taken, the court or jury, as the case may be, must find that value as part of the verdict or finding, otherwise the conviction cannot be sustained. A finding of guilty "in manner and form as charged in the information" is not sufficient to satisfy the requirements of the statute. The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

OFFICE OF THE STATE OF
ILLINOIS

Defendant in Error,

vs.

WILLIAM O'DONN,

Plaintiff in Error.

SHOWN TO MUNICIPAL COURT
OF CHICAGO.

2111.A.402

THE JUDICIAL DEPARTMENT, BEING THE OFFICE OF THE COURT.

By an information filed in the Municipal Court

it was charged that the defendant "did steal, take and carry

away six motion picture cameras of the value of nine dollars

of the goods and chattels of," etc. Upon arraignment the

defendant entered a plea of not guilty; trial by jury was

waived and the cause was submitted for determination by the

court. After the hearing of evidence defendant was found

guilty "in manner and form as charged in the information

hereto." Later, on motion of the State's attorney for final

judgment on the finding, it was adjudged by the court that the

defendant "is guilty of the criminal offense of larceny"; he

was sentenced to confinement at labor in the House of Correc-

tion for one year and fined five dollars. The cause is before

us by writ of error for review.

The trial court made no finding as to the value of

the property alleged to have been stolen, and, as held in

People v. Hoffman, 183 Ill. App. 207, whenever the nature or

kind of punishment is dependent on the value of what has been

taken, the court or jury, as the case may be, must find that

value as part of the verdict or finding, otherwise the convic-

tion cannot be sustained. A finding of guilty "in manner and

form as charged in the information" is not sufficient to satisfy

the requirements of the statute. The judgment must therefore be

reversed and the cause remanded.

4226

HARRY S. MECARTNEY,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

211 I.A. 403

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is another stage in the history of a case which in some phase has been before the state and federal courts for many years past. The list of adjudications is long; the most recent are City v. Thomasson, 259 Ill. 322, and Mecartney v. City, 273 Ill. 276, in which are full statements of the facts and issues involved; a statement now would be merely repetition.

In the last mentioned case the Supreme Court held that the plaintiff, Mecartney, was "entitled to the awards, with interest, if they bear interest." (p. 285) Upon remandment the Circuit Court allowed plaintiff interest in the sum of \$20,442.41, and defendant now asks us to reverse the judgment therefor.

Is plaintiff entitled to interest on the awards? Defendant says he is not, for the reason that the ordinance in this case provided "that said improvement shall be made and the cost thereof paid for by special assessment to be levied on the property benefited thereby to the amount that the same shall be benefited thereby"; that this is not an ordinary judgment against the city under the Eminent Domain act, but merely an order fixing the amount of the awards to be paid strictly in accordance with the terms of the condemnation ordinance. Defendant says it has been so adjudicated in City v. Thomasson, supra, where the court said: "While the property owners, on delivery of

HARRY E. ROBERTSON,
Defendant in Error,
vs.
CITY OF CHICAGO,
Plaintiff in Error.

WENT TO DISTRICT COURT,
FOUR COUNTY.

211 I.A. 403

MR. JUSTICE ROBERTSON DELIVERED THE OPINION OF THE COURT.

This is another case in the history of a case

which in the past has been before the State and Federal
courts for many years past. The list of adjudications is
long; the most recent are City v. Thompson, 286 Ill. 344,

and Robertson v. City, 273 Ill. 472, in which the full

statements of the facts and issues involved; a statement now
would be merely repetition.

In the last mentioned case the Supreme Court

held that the plaintiff, Robertson, was "entitled to the

rights, and interest, if they bear interest." (p. 363)

Upon remand the District Court allowed plaintiff in-

terest in the sum of \$20,442.41, and defendant now seeks to

reverse the judgment therefor.

Is plaintiff entitled to interest on the award?

Defendant says he is not, for the reason that the ordinance

in this case provided "that said improvement shall be made

and the cost thereof paid for by special assessment to be

levied on the property benefited thereby to the amount

that the same shall be benefited thereby"; that this is not

an ordinary judgment against the city under the ordinary

doctrine, but merely an order fixing the amount of the

assess to be paid strictly in accordance with the terms

of the ordinance. Defendant says it has been

so adjudicated in City v. Thompson, supra, and the

court said: "While the property owners, on liability of

possession to the city, immediately acquired a vested right in their compensation, they did not acquire a right to have that compensation provided for and paid to them in any other manner than that specified in the ordinance. At the time possession was given the ordinance authorizing the improvement had been passed. * * * * They were bound by the provisions of the ordinance, and, although out of possession, must await payment according to its terms." Hence, defendant argues that plaintiff is restricted to the terms of the ordinance concerning payment, and as the ordinance makes no provision for the payment of interest plaintiff is not entitled to interest.

It also appears that in these proceedings the amount of the assessments for benefits was equal to the amount of the awards, that as a bookkeeping proposition one offset the other; and it is argued with force that the records show that the delay in collecting these awards has been caused in a large measure by the obstructive conduct of plaintiff himself, which has been adjudicated to have been unlawful, that is, without legal right, and it is persuasively urged that it would be a great injustice to allow him interest for the period he illegally prevented the collection of the awards.

Did we feel inclined to yield assent to these contentions we could not do so, for we are of the opinion that the Supreme Court, in McCartney v. City, 273 Ill. 276, has adjudicated this question adversely to defendant, and that plaintiff's claim of res judicata must control.

Both reasoning and language in this last named opinion clearly indicate a conclusion that plaintiff is en-

possession to the city, immediately acquired a vested right in their compensation, they did not acquire a right to have that compensation provided for and paid to them in any other manner than that specified in the ordinance. At the time

possession was given the ordinance authorizing the improvement had been passed. * * * They were bound by the provisions of the ordinance, and, although out of possession, must await payment according to its terms. Hence, defendant argues that plaintiff is restricted to the terms of the ordinance concerning payment, and as the ordinance makes no provision for the payment of interest plaintiff is not entitled to interest.

It also appears that in cases preceding the award of the assessments for benefits was equal to the amount of the awards, that as a bookkeeping proposition one offset the other; and it is argued with force that the records show that the delay in collecting these awards had been caused in a large measure by the obstructive conduct of plaintiff himself, which has been adjudicated to have been unlawful, that is, without legal right, and it is persuasively urged that it would be a great injustice to allow him interest for the period he illegally prevented the collection of the awards.

And we feel inclined to view matters in these conditions we could not do so, for we are of the opinion that the Supreme Court, in Wheeler v. City, 111 Ill. 475, has indicated this position adversely to defendant, and that plaintiff's claim of tax liability must control. Our reasoning and language in this last named opinion clearly indicate a conclusion that plaintiff is not

titled to interest. Defendant hangs its hope on the provisional words in the opinion referring to the awards, "if they bear interest," and contends that this leaves the entire question open. We do not think so. The many cases cited in the opinion and much that is said would be entirely superfluous had the court intended to leave the question open. These provisional words may refer to the possibility of the order of awards containing words negating interest. No such words appear, and we must conclude that the Supreme Court holds that the general rule prevails and plaintiff is entitled to interest.

Upon remandment for a new trial the defendant asked leave to file an additional plea setting up the five-year statute of limitations. This was denied by the trial Judge, and it is argued that this was erroneous. The refusal of the trial court could be justified on the ground that the defendant did not file or ask leave upon the first trial to file the defense of the statute of limitations, but did so only after trial and review by the Supreme Court and remandment. We are of the opinion that it was no abuse of discretion on the part of the trial court to refuse to allow the plea to be filed on the ground that the motion was made too late in the history of the case. A further reason supporting the action of the trial court is in the fact that even if the plea of the statute of limitations had been filed and sustained it would not have ended the litigation, as plaintiff would still have a right of action in assumpsit or mandamus. City v. Thomasson, 259 Ill. 322; McCartney v. City, 273 Ill. 276.

Defendant questions the application of the partial payments made on awards, urging that these payments should be applied first to the principal. Upon the first trial the court

filed as interest. Defendant names its hope on the previ-

ously words in the opinion referring to the words, "it

they bear interest," and otherwise that this leaves the an-

live question open. We do not think so. The many cases

cited in the opinion and much that is said would be entirely

in conflict with the court intended to leave the question

open. These provisional words may refer to the possibility

of the order of words containing words negating interest.

No such words appear, and we must conclude that the court

must hold that the general rule prevails and plaintiff is

entitled to interest.

Upon remandment for a new trial the defendant

asked leave to file an additional plea setting up the live-

year statute of limitations. This was denied by the trial

judge, and it is argued that this was erroneous. The refusal

of the trial court could be justified on the ground that the

defendant did not file or ask leave upon the first trial to

file the defense of the statute of limitations, but did so

only after trial and review by the Supreme Court and reman-

ment. We are of the opinion that it was no cause of discre-

tion on the part of the trial court to refuse to allow the

plea to be filed on the ground that the action was made too

late in the history of the case. A further reason supporting

the action of the trial court is in the fact that even if the

plea of the statute of limitations had been filed and sus-

tained it would not have ended the litigation, as plaintiff

would still have a right of action in assault or battery.

Gib v. Thompson, 229 Ill. 322; McCarthy v. City, 273 Ill. 276.

Defendant questions the application of the partial

payments made on contract, urging that these payments should be

applied first to the principal. Upon the first trial the court

held that they should be applied first to pay interest accrued on the awards, any balance to be credited upon the principal. That method was before the Supreme Court upon review, and its propriety could properly have then been called in question. The rule is that not only those matters which are presented for determination, but also those which could have been presented, shall be deemed to have been adjudicated by the decision of the Supreme Court. We must therefore conclude that the method of application of the payments has been impliedly approved.

The record now before us is the same, or substantially the same, as it was upon the former trial and review by this court and the Supreme court. We are of the opinion that it clearly comes within the rule that the former decision of the Supreme Court is res judicata. See People v. Powers, 283 Ill. 438, and cases cited.

Holding as we do, that the questions now before us have either directly or constructively been adjudicated in Mecartney v. City, 273 Ill. 276, following that opinion the judgment of the Circuit Court is affirmed.

AFFIRMED.

held that they should be applied first to pay interest on
debts on the estate, any balance to be credited upon the
principal. That method was before the Supreme Court upon
review, and its propriety could properly have then been
called in question. The rule is that not only those mat-
ters which are presented for determination, but also those
which could have been presented, shall be deemed to have
been adjudicated by the decision of the Supreme Court, so
that therefore concludes that the method of application of
the payments has been implicitly approved.

The record now before us is the same, or sub-
stantially the same, as it was upon the former trial and re-
view by this court and the Supreme Court. We are of the
opinion that it clearly comes within the rule that the
former decision of the Supreme Court is res judicata. See
People v. Lewis, 282 Ill. 434, and cases cited.

Holding as we do, that the questions now before
us have either directly or constructively been adjudicated
in McCarthy v. City, 273 Ill. 576, following that opinion
the judgment of the Circuit Court is affirmed.

AFFIRMED.

BENJAMIN F. BIRCH,
Defendant in Error,

vs.

CITY OF CHICAGO et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT,

COOK COUNTY.

211 I.A. 404

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Petitioner, by mandamus, sought to compel respondents to restore his name to the payroll of patrolman in the Police Department of the City of Chicago. A general demurrer being overruled, defendants elected to stand thereby and judgment was rendered that the writ of mandamus issue.

This judgment must be reversed for the reasons stated in a number of decisions both in this court and in the Supreme Court, having to do with similar petitions. These cases hold substantially that the petitioner must show the legal existence of the office or position sought, and if it does not appear that there is an ordinance creating such office or position the writ of mandamus will not issue. No ordinance creating the position of patrolman is shown. Among such cases are Rudnick, Admr. Est. of Seannell v. City of Chicago et al., 198 Ill. App. 474; Vaughn v. City of Chicago, 198 Ill. App. 114; People ex rel. Hammerschleg v. City of Chicago, 198 Ill. App. 451; Preston v. City of Chicago, 246 Ill. 26; Stott v. City of Chicago, 205 Ill. 281; Moon v. The Mayor, 214 Ill. 40; Bullis v. City of Chicago, 235 Ill. 472; McNeill v. City of Chicago, 212 Ill. 481. It is unnecessary to repeat what is said in the opinions in these cases. Applying the rules there stated, the judgment of the Circuit Court is reversed.

REVERSED.

THOMAS P. NICHOL,
 Defendant in Error,
 vs.
 CITY OF CHICAGO et al.,
 Plaintiffs in Error.

211 I.A. 404

1. JUSTICE REVERLY WITHIN THE OFFICE OF THE COURT.

Petitioner, by mandamus, sought to compel respondents to restore his name to the payroll of patrolman in the Police Department of the City of Chicago. A General demurrer being overruled, defendants elected to stand there by and judgment was rendered that the writ of mandamus issue. This judgment must be reversed for the reasons stated in a number of decisions both in this court and in the Supreme Court, having to do with similar petitions. These cases hold substantially that the petitioner must show the legal existence of the office or position sought, and if it does not appear that there is no ordinance creating such office or position the writ of mandamus will not issue. No ordinance creating the position of patrolman is shown. Among such cases are Robinson, Adam, et al. of Hannibal v. City of Chicago 111 Ill. App. 474; Laughlin v. City of Chicago 108 Ill. App. 114; People ex rel. Hunschler v. City of Chicago 100 Ill. App. 451; Freston v. City of Chicago 111 Ill. App. 251; Scott v. City of Chicago 205 Ill. App. 472; Wells v. City of Chicago 212 Ill. App. 481. It is unnecessary to repeat what is said in the opinions in these cases. Applying the rules there stated, the judgment of the Circuit Court is reversed.

ALBERT MACRAE,
Defendant in Error,

vs.

AMBROSE J. KRIER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 405

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon a promissory note, had judgment against the defendant for \$200 from which defendant appeals.

It is presented as ground for reversal that the evidence shows the legal owner of the note was the Mac-Rae Blue Book Company, a corporation. The evidence does tend to show this, and whether or not this corporation assigned the note to the plaintiff, MacRae, is not made to appear, as the note itself is not in the record. The rule is that a suit on a promissory note must be brought in the name of the party holding the legal title. Clauser v. Stone, 29 Ill. 114; Newman v. Ravenscroft, 67 Ill. 496.

The defendant asserted fraud in the execution of the note. This made it necessary that the note itself should be introduced in evidence. Apparently this has not been done.

Upon the record before us this judgment cannot stand, and it is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ORDER TO MUNICIPAL COURT
OF CHICAGO.

ALBERT WACHS,
Defendant in Error,
vs.
AMROSE J. KRICK,
Plaintiff in Error.

2111.A.405

MR. JUSTICE ROBERT H. HARRIS OF THE COURT.

Plaintiff, bringing suit upon a promissory note, had judgment against the defendant for \$250 from which defendant appeals. It is presented as ground for reversal that the evidence shows the legal owner of the note was the defendant The Five Book Company, a corporation. The evidence does tend to show this, and whether or not this corporation assigned the note to the plaintiff, because, it not made to appear, as the note itself is not in the record. The rule is that a suit on a promissory note must be brought in the name of the party holding the legal title. Quarles v. Stone, 29 Ill. 114; Wagner v. Fawcett, 67 Ill. 466.

The defendant asserted error in the execution of the note. This made it necessary that the note itself should be introduced in evidence. Apparently this has not been done. Upon the record before us this judgment cannot stand, and it is reversed and the cause remanded for a new trial.

REVEREND AND BELIEVED,

FRED SCHMIDT et al.,
Appellants,

vs.

EDWARD SCHMIDT, in his own
right and as Executor, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

211 I.A. 409

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The facts in this case are stated in the opinion in Schmidt v. Schmidt, 277 Ill. 191, and also in an opinion of this court filed December 17, 1917, in case No. 23371. ^{209 Ill. App. 146}

The question for our determination is whether the court erred in decreeing that a bequest of \$6,000 to Edward Schmidt, appellee, was a charge upon the real estate by the provisions of the will.

Herman Schmidt, the deceased, left forty acres of land in Melrose Park and personal property of the value of \$160. Debts against his estate were proved and allowed aggregating \$1,243.03. By his will it was provided, first, that his just debts and funeral expenses should be paid out of the estate; second, "I give, devise and bequeath unto my son Edward Schmidt, the sum of six thousand dollars (\$6,000) in consideration for his work on my farm and in caring for me during life." The third clause was: "All the rest and residue and remainder of my property whatsoever and wheresoever I give, devise and bequeath unto my children," etc.

As a general rule legacies are not charges upon realty unless expressly or impliedly made so by the terms of the will. Shuld v. Wilson, 225 Ill. 336; Haynes v. McDonald, 252 Ill. 236. But if the intention of the testator is that such legacy shall be a charge upon the real estate, this in-

ALLIANCE TRUST COMPANY COURT,
COOK COUNTY.

904 A.I.A. 409

EDWARD SCHMIDT, as his own
Appellee,
vs.
EDWARD SCHMIDT et al.,
Appellants.

THE JUSTICE RECENTLY DELIVERED THE OPINION OF THE COURT.

The facts in this case are stated in the opinion in Schmidt v. Schmidt, 277 Ill. 191, and also in an opinion of this court filed December 17, 1917, in case No. 28871. The question for our determination is whether the court erred in decreeing that a bequest of \$6,000 to Edward Schmidt, a - bequest upon the real estate by the provisions of the will.

Edward Schmidt, the deceased, left forty acres of land in Illinois Park and personal property of the value of \$160. Debts against his estate were proved and allowed aggregating \$1,243.03. By his will it was provided, first, that his just debts and funeral expenses should be paid out of the estate; second, "I give, devise and bequeath unto my son Edward Schmidt, the sum of six thousand dollars (\$6,000) in consideration for his work on my farm and in caring for me during life." The third clause was: "All the rest and residue and remainder of my property whatsoever and wheresoever I give, devise and bequeath unto my children," etc.

As a general rule legacies are not charged upon realty unless expressly or impliedly made so by the terms of the will. Smith v. Smith, 225 Ill. 538; James v. Schmidt, 225 Ill. 135. But if the intention of the testator is that such legacy shall be a charge upon the real estate, this in-

tention will prevail although it should not be shown by express words, for it may be implied from the whole will taken together. Reid v. Corrigan, 143 Ill. 402. In 19 Am. & Eng. Ency. of Law, 2nd ed., p. 1354, the rule is stated as follows:

"Where pecuniary legacies are given generally and there is a gift of the residue of real and personal estate, the whole residue being blended in one mass, it is now the settled rule in England and in most of the jurisdictions in the United States, that the legacies are charged upon the entire residue including the residuary realty."

This is supported by the citation of a very large number of cases, including a number in Illinois. We also find the following cases supporting this statement: Williams v. Williams, 189 Ill. 500; Simonsen v. Huthhinsen, 231 Ill. 508; Haynes v. McDonald, 252 Ill. 336. Following these decisions we are of the opinion that the chancellor construed the will in accordance with the intention of the testator, and that the decree entered was proper in this respect, and it is affirmed.

AFFIRMED.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

• 254458

MATTIE S. HUNT,
Defendant in Error.

vs.

THOMAS M. HUNT,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

211 I.A. 410

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error is brought in review the record in proceedings for divorce in which complainant was awarded a decree.

Complainant's original bill was for separate maintenance. Subsequently, after service of notice upon the defendant, complainant filed an amended bill asking for divorce. No rule was entered upon defendant to answer the amended bill, and without further notice his default was taken for failure to answer the amended bill, and the cause proceeded to a hearing as upon bill confessed. Proper practice would have required a rule upon defendant to plead to the amended bill before he could have been in default. Fratt v. Grimes, 35 Ill. 164; Moody v. Thomas, 79 Ill. 274.

Complainant sought divorce on the ground of extreme and repeated cruelty, and upon the hearing the only evidence adduced in support of this charge was the statement of complainant that ever since their marriage defendant had been guilty of excessive sexual intercourse. A doctor testified that he was unable to say this had any effect upon complainant's state of health. We are of the opinion that this evidence was not sufficient to support the charge made in the bill. Youngs v. Youngs, 130 Ill. 230.

A further consideration is that the parties lived together for sixteen years, so that if, as complainant says,

MATTHEW E. HUNT,
Defendant in Error,
vs.
THOMAS E. HUNT,
Plaintiff in Error.

2111.A.410

MR. JUSTICE ROBERTSON delivered the opinion of the court.

By this writ of error is brought in review the record in proceedings for divorce in which complainant was awarded a decree.

Complainant's original bill was for divorce

and alimony. Subsequently, after service of notice upon

the defendant, complainant filed an amended bill setting

for divorce. No plea was entered upon defendant's answer

the amended bill, and without further notice his default was

taken for failure to answer the amended bill, and the cause

proceeded to a hearing on the bill as amended. After proce-

ding could have required a rule upon defendant to file to

the amended bill before he could have been in default. Trust

v. Oliver, 35 Ill. 184; Moody v. Thomas, 79 Ill. 274.

Complainant sought divorce on the ground of im-

potence and repeated adultery, and upon the hearing the only evi-

dence adduced in support of this charge was the statement of

complainant that ever since their marriage defendant had been

guilty of excessive sexual intercourse. A doctor testified

that he was unable to say this had any effect upon complain-

ant's state of health. To one of the opinions that this evi-

dence was not sufficient to support the charge made in the

bill, Youngs v. Youngs, 130 Ill. 320.

A further consideration is that the parties lived

together for sixteen years, so that it, as complainant says,

excessive sexual conduct began when they were first married, it would seem that the offense had been condoned. Abbott v. Abbott, 192 Ill. 439.

Complainant has not appeared in this court to defend her decree, and we are unable to see, in view of the lack of evidence, how it can be maintained. For the reasons above indicated the decree is reversed and the cause is remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

exclusive sexual conduct began when they were first married.
 it would seem that the offense had been abandoned. Appell
v. Appell, 123 Ill. 432.

Complaint was not answered in this court to
 defend her decree, and we are unable to see, in view of the
 lack of evidence, how it can be maintained. For the reason
 above indicated the decree is reversed and the cause is re-
 manded with directions to dismiss the bill for want of
 equity.

REVERSED AND REMANDED

WITH DIRECTIONS.

201 - 23544

THE CITY OF WEATHERFORD,
a municipality of the
State of Oklahoma,
Appellant,

vs.

JOHN NUVERN, doing business
as John Nuveen and Company,
Bankers,
Appellee.

211 I.A. 411

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The plaintiff appealed from a judgment in favor of defendant based on the court's finding that the cause of action had been previously adjudicated in the federal courts. The action is in assumpsit and predicated on the refusal of defendant to take and pay for certain of plaintiff's municipal bonds, according to defendant's alleged contract.

It would subserve no useful purpose and add nothing to the value of our conclusion to set forth the numerous and lengthy pleadings in this action and those of the action in the federal courts, to demonstrate that the two causes of action between the same parties rest on the same promises and contract, as was pleaded in the pleas of res judicata. This is so obvious from a comparison of the declarations in the two actions as to preclude discussion.

The principal contention is whether or not the final order of the federal trial court, affirmed by the United States Circuit Court of Appeals, disposed of the

U.S. DISTRICT COURT

THE CITY OF OKLAHOMA,
a municipality of the
State of Oklahoma,
Appellant,

APPEAL FROM
DISTRICT COURT,
OKLAHOMA COUNTY.

vs.
JOHN MUEYER, doing business
as John Mueyer and Company,
Appellee.

MR. J. MUEYER, JUDGE OF THE COURT,
DELIVERED THE OPINION OF THE COURT.

The plaintiff appealed from a judgment in favor of defendant based on the court's finding that the cause of action had been previously adjudicated in the federal courts. The action is in assumpsit and predicated on the refusal of defendant to take and pay for certain of plaintiff's municipal bonds, according to defendant's alleged contract.

It would observe no useful purpose and add nothing to the value of our conclusion to set forth the numerous and lengthy pleadings in this action and those of the action in the federal courts, to demonstrate that the two causes of action between the same parties rest on the same promises and contract, as was pleaded in the pleas of the defendant. This is so obvious from a comparison of the declarations in the two actions as to preclude discussion.

The principal contention is whether or not the final order of the federal trial court, affirmed by the United States Circuit Court of Appeals, disposed of the

merits of the controversy or merely determined the sufficiency of the declaration as finally amended.

The issues herein were determined in the court below without a jury by proof of the record of the cause in the federal courts including the final order referred to, and the testimony of the federal trial judge. The record disclosed that a general demurrer and eleven special demurrers, previously filed, had been passed on, and were by said order allowed to stand to the declaration as finally amended.

The order in question reads:

"Now come the parties hereto by their respective attorneys and now comes on to be heard the defendant's demurrer to the amended declaration. After hearing arguments * * * it is ordered that said demurrer be and is hereby sustained. It is further ordered that the demurrers heretofore filed herein stand to the declaration as amended. Thereupon the plaintiff elects to stand by its declaration as amended. It is thereupon ordered and adjudged by the court that this case be and the same is hereby dismissed."

Over objection the trial judge testified that so far as he recalled there was no argument on the special demurrers, that he disposed of the case on the general demurrer, "on the broad ground that there was no cause of action stated in the declaration," that he did not consider any of the grounds raised by the special demurrers, and that he so indicated his views when he directed the clerk to enter the order. Neither the clerk's minutes nor the order itself is inconsistent with such statement.

In rebuttal plaintiff offered, and the court refused to receive, parts of defendant's printed brief filed in the United States Circuit Court of Appeals, indicating his reliance on defects in the declaration as finally amended and demurred to.

merits of the controversy or merely determined the sufficiency of the declaration as finally amended.

The issues herein were determined in the court below without a jury by proof of the record of the cause in the federal courts including the final order referred to, and the testimony of the federal trial judge. The record disclosed that a general demurrer and eleven special demurrers, previously filed, had been passed on, and were by said order allowed to stand to the declaration as finally amended.

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Over objection the trial judge testified that so far as he recalled there was no argument on the special demurrers, that he disposed of the case on the general demurrer, "on the broad ground that there was no cause of action stated in the declaration," that he did not consider any of the grounds raised by the special demurrers, and that he so indicated his views when he dictated the clerk to enter the order. Neither the clerk's minutes nor the order itself is inconsistent with such statement.

In rebuttal plaintiff offered, and the court refused to receive, parts of defendant's printed brief filed in the United States Circuit Court of Appeals, indicating his reliance on defects in the declaration as finally amended and returned to.

That a judgment on a general demurrer is a judgment on the merits and a bar to a subsequent suit on the same claim or demand will not be questioned (Vanlandingham v. Ryan, 17 Ill. 25, 30; Marie Church v. Trinity Church, 253 id. 21, 25); and it is equally conclusive by way of estoppel as a verdict finding the same facts followed by a judgment on such verdict. (Jackson v. Industrial Board, 280 id. 526).

But it is contended that the testimony of the trial judge as to what was passed on by him in entering said order was inadmissible. While it is unquestioned that parol evidence is inadmissible to contradict a record it is also well settled law that when a former recovery is relied on as a bar parol evidence not contradictory of the record may, in case of doubt, be introduced to show what was included within and investigated on the trial of the issue. (C. B. & Q. R. R. Co. v. Schaffer, 124 id. 112; People v. Burt, 267 id. 640, 642; People v. Becker, 253 id. 131, 136, and Vanlandingham v. Ryan, 17 id. 25, 28.)

That the order of the federal court relied on as a bar to the cause of action is indefinite and uncertain is manifest in view of the state of the record of that court showing the pendency of both a general demurrer and special demurrers at the time of its entry. In such a state the reference in the order to allowing "demurrers heretofore filed" to stand (which included the general demurrer and eleven special demurrers) and to sustaining "defendant's demurrer" is so uncertain and indefinite as to present a doubt whether the court passed on a single demurrer or all of them. The language does not justify the conclusion that the court passed on the special demurrers only. Whether it passed on them or not, if it passed on the general

That a judgment on a general demurrer is a judgment on the merits and a bar to a subsequent suit on the same claim or demand will not be questioned (Verlander v. Ryan, 17 Ill. 42, 50; Marie Church v. Trinity Church, 253 Ill. 21, 25); and it is equally conclusive by way of estoppel as a verdict finding the same facts followed by a judgment on such verdict. (Jackson v. Industrial Board, 280 Ill. 126).

But it is contended that the testimony of the trial judge as to what was passed on by him in entering said order was inadmissible. While it is unquestioned that parol evidence is inadmissible to contradict a record it is also well settled law that when a former recovery is relied on as a bar parol evidence not contradictory of the record may, in case of doubt, be introduced to show what was intended within and investigated on the trial of the issue. (O. R. & A. R. Co. v. Schaller, 134 Ill. 112; People v. Burr, 267 Ill. 640, 642; People v. Becker, 233 Ill. 127, 128; and Verlander v. Ryan, 17 Ill. 42, 50).

That the order of the federal court relied on as a bar to the cause of action is indefinite and uncertain is manifest in view of the state of the record of that court showing the pendency of both a general demurrer and special demurrers at the time of its entry. In such a state the reference in the order to allowing "demurrers heretofore filed" to stand (which included the general demurrer and eleven special demurrers) and to sustaining "defendant's demurrer" is as uncertain and indefinite as to present a doubt whether the court passed on a single demurrer or all of them. The language does not justify the conclusion that the court passed on the special demurrers only. Whether

demurrer then it disposed of the merits of the controversy. In view of such indefiniteness and uncertainty we think the admission of the testimony of the trial judge as to what was actually argued, considered and decided in sustaining "said demurrer", comes clearly within the rule above stated, it being consistent with, and not contradictory of, the record.

It was said in Jackson v. Industrial Board, supra, that "public announcement or reason of the court or judge may be proven by parol evidence in order to determine what issues were definitely passed upon and decided." In that case parol testimony was introduced at a hearing before the Industrial Board to show that the circuit court in sustaining a demurrer to a declaration announced the particular ground of its decision. But we deem it unnecessary to distinguish the cases in which the doctrine has been discussed, or to elaborate upon a doctrine so well established.

This being the case and the evidence being heard without a jury, the alleged errors in receiving the proceedings and pleadings in the federal court that preceded the last amended declaration to which the demurrer was sustained, and its refusal to receive in evidence portions of defendant's briefs used on appeal from said order, need not be considered, for with or without such evidence or any part thereof the court's finding might well rest on the testimony of the trial judge alone, it being conclusive of the question whether the case was disposed of on its merits.

AFFIRMED.

thereafter then it disposed of the merits of the controversy.

In view of such considerations and uncertainty as to

the admission of the testimony of the trial judge as to

what was actually said, considered and decided in the

case, it is difficult to say, "well, the trial judge

stated, it being consistent with, and not contradictory of,

the record.

It was said in Industrial Board, supra,

that "public announcement or reason of the court or judge

may be proven by parol evidence in order to determine what

issues were definitely raised upon and decided." In that

case parol testimony was introduced at a hearing before the

Industrial Board to show that the circuit court in sustaining

a demurrer to a declaration announced the particular ground

of its decision. But we deem it unnecessary to distinguish

the cases in which the decision has been discussed, or to

elaborate upon a doctrine so well established.

This being the case and the facts as being proved

without a jury, the alleged error in receiving the pro-

ceedings and findings in the Federal court must precede

the last alleged declaration to which the demurrer was

sustained, and its refusal to receive in evidence portions

of defendant's briefs used in support of said order, need

not be considered, for with or without such evidence or

any part thereof the court's finding might well rest on

the testimony of the trial judge alone, it being conclusive

of the question whether the case was disposed of on its

merits.

ATTORNEY.

223 - 23568

JOHN CONNERS,
Appellee,

vs.

GERTRUDE WAGNER et al.,

ON APPEAL OF MAUD GUETRICH,
WILLIAM GUETRICH and L.
HISGEN,
Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

211 I.A. 413

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case contains three counts, none of which states a cause of action. It alleges that the relationship of tenant and landlord existed between the plaintiff (appellee) and the defendants (appellants), that plaintiff was in possession of the rented premises, that it was the duty of defendants to keep them in tenantable repair, that they failed to do so, and that injury resulted to the plaintiff by his slipping and falling down a stairway on the premises that was without a railing. No one of the counts states the agreement between the parties nor any facts from which a duty to repair arises, hence states no cause of action.

It is elementary law that the landlord is not bound to make repairs unless he has assumed such duty by agreement with the tenant. (Sunasack v. Morey, 196 Ill. 569.) The terms of the letting not being stated, the averment that it was the landlord's duty to repair is a mere conclusion. Without a statement of facts from which such duty arises, no cause of action was stated. (Sargent Co. v. Baubliss, 215 id. 428-431.)

JOHN CONNORS,
Appellee,

vs.

GEORGE WAGNER et al.,
Appellants,
OF APPEAL OF LAND DISTRICT,
WILLIAM GUERINICH and D.
HIGGS,

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

ST. I. A. 413

MR. FREDERICK J. HARRIS
DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case contains three counts, none of which states a cause of action. It alleges that the relationship of tenant and landlord existed between the plaintiff (appellee) and the defendant (appellant), that plaintiff was in possession of the rented premises, that it was the duty of defendant to keep them in tenable repair, that they failed to do so, and that injury resulted to the plaintiff by his slipping and falling down a stairway on the premises that was without a railing. No one of the counts states the agreement between the parties nor any facts from which a duty to repair arises, hence states no cause of action.

It is elementary law that the landlord is not bound to make repairs unless he has assumed such duty by agreement with the tenant. (Wassack v. Worsey, 198 Ill. 562.) The terms of the letting not being stated, the agreement that it was the landlord's duty to repair is a mere conclusion. Without a statement of facts from which such duty arises, no cause of action was stated. (Relevant Co. v. Apple, 215 Ill. 432-431.)

Each of the defendants (except Gertrude Wagner, who was not served with summons) filed an affidavit of merits, however, traversing the allegations of duty, etc., and asserting that plaintiff was injured by reason of his own negligence. On February 14th, 1917, none of the defendants being present at the trial, a finding and judgment were entered for plaintiff for \$450. Two days later defendants filed a motion, supported by affidavit, to vacate the finding and judgment. On March 17th, 1917, after several continuances, the motion was overruled. The court's jurisdiction over the case then ceased. (People v. Wells, 255 id. 450.) But thereafter, on the same day, leave was given to plaintiff to file amendments to his statement of claim, and to defendants to file an affidavit of merits, and on March 31st, the affidavit of merits filed by defendants was stricken on plaintiff's motion, though it stated a legal defense to plaintiff's assumed ground of action.

It is unnecessary to consider intervening errors or refer to the irregular and unauthorized procedure after March 17th, for the original statement of claim not stating a cause of action is so defective as not to sustain a judgment, (Gillman v. Chicago Railways Co., 268 id. 305) and the amendments gave it no vitality.

Even if the statement of claim as amended stated a cause of action it was equivalent to setting up a new cause of action, which in the absence of statutory authority is not allowable after judgment. (31 Cyc. 405.) Our statute permits amendment after judgment for defects or imperfections in matters of form, but not as to substance. (C. & A. R. R. Co. v. Clausen, 173 id. 100-103.) An unauthorized amendment

Each of the defendants (except Garfield Wagner, who was not served with summons), filed an affidavit of merits, however, traversing the allegations of duty, etc., and asserting that plaintiff was injured by reason of his own negligence. On February 14th, 1917, none of the defendants being present at the trial, a finding and judgment were entered for plaintiff for \$450. Two days later defendant filed a motion, supported by affidavit, to vacate the finding and judgment. On March 17th, 1917, after several continuances, the motion was overruled. The court's jurisdiction over the case then ceased. (People v. Wells, 255 id. 480.) But thereafter, on the same day, leave was given to plaintiff to file amendments to his statement of claim, and to defendant to file an affidavit of merits, and on March 18th, the affidavit of merits filed by defendant was stricken on plaintiff's motion, though it stated a legal defense to plaintiff's assumed ground of action. It is unnecessary to consider intervening errors or refer to the irregular and unauthorized procedure after March 17th, for the original statement of claim, not stating a cause of action is as defective as not to sustain a judgment. (Illinois v. Chicago Railway Co., 268 id. 305) and the amendments gave it no vitality. Even if the statement of claim as amended stated a cause of action it was equivalent to setting up a new cause of action, which in the absence of statutory authority is not allowable after judgment. (21 Cyc. 408.) Our statute permits amendment after judgment for defects or imperfections in matters of form, but not as to substance. (U. S. v. N. E. Co. v. Glendon, 171 id. 100-105.) An unauthorized amendment

to a defective statement of claim did not, therefore, better the situation. The judgment still rested on the original statement of claim which was insufficient to sustain it. Having no legal basis it must be reversed.

REVERSED.

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the situation. The judgment still rested on the original
statement of claim which was insufficient to sustain it.
Having no legal basis it must be reversed.

REVEREND.

ENRICO FORMELLA, doing business
as E. Formella & Company, a
corporation,

Appellee,

vs.

DURAND and KASPER COMPANY, a
corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 414

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

On March 10th, 1917, plaintiff (appellee) made an offer to the salesman for defendant company (appellant) to buy 250 barrels of flour at \$8.80 per barrel to be taken in sixty days. After it was submitted to defendant's manager, the salesman at his request procured plaintiff's signature to a written order for the same on those terms, dated March 15th, and brought it to him, leaving a duplicate copy thereof with plaintiff. Five barrels as a sample, though subsequently treated as part of the order, were delivered before the signing of said order, and twenty-five barrels on April 25th. Payment for these deliveries was made April 16th and May 10th, respectively, at the price so agreed upon.

The flour was ordered for the purpose of manufacturing macaroni for one of plaintiff's customers, and it was recognized that deliveries would be called for as needed. Requests for more deliveries were made in the meantime, but not honored, defendant requiring payment for deliveries already made before making another, which was made. On May 10th, after payment for the last delivery, plaintiff ordered twenty-five barrels more. He claimed that defendant's

WILLIAMSON, doing business
as W. W. Williamson & Company, a
corporation,

Appellee,

vs.

DUNHAM and KAPLAN COMPANY, a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

WILLIAMSON

DELIVERED THE OPINION OF THE COURT.
MR. PRESIDING JUSTICE HARRIS

On March 10th, 1917, plaintiff (appellee) made
an offer to the salesman for defendant company (appellant)
to buy 250 barrels of flour at \$8.00 per barrel to be
taken in sixty days. After it was submitted to defendant's
manager, the salesman at his request procured plaintiff's
signature to a written order for the same on those terms,
dated March 10th, and brought it to him, leaving a duplicate
copy thereof with plaintiff. Five barrels as a sample,
though subsequently treated as part of the order, were
delivered before the signing of said order, and twenty-five
barrels on April 25th. Payment for these deliveries was
made April 10th and May 10th, respectively, at the price
so agreed upon.

The flour was ordered for the purpose of manufacturing
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recognized that deliveries would be called for as needed.
Requests for more deliveries were made in the meantime, but
not honored, defendant refusing payment for deliveries
already made before making another, which was made. On May
10th, after payment for the last delivery, plaintiff ordered
twenty-five barrels more. He claimed that defendant's

manager then said it had not the flour on hand but would get it. Getting no satisfaction from further requests made in the meantime, as he testified, he asked for the rest of the flour on May 12th and offered to pay for the same at the contract price through his bank, presenting from it a letter of credit and assurances of payment. No action seems to have been taken on this request and offer, though Formella testified that defendant refused to make any further delivery. While defendant's manager denied making any refusal and admits receiving such requests and such letter of credit and that he did not require cash payment, there was no further delivery under the contract and no evidence in the record indicating an intention or offer on the part of defendant to make further delivery except that in a conference some days later with reference to a settlement it claimed a willingness to do so provided arrangements for credit were then made.

Eliminating argument, conclusions, assumptions and recitations of evidentiary facts from defendant's affidavit of defense to ascertain what defense was really stated, and referring only to what was relied on at the trial and argued here, we find the defense to be (1) that if the proper date of the contract was March 10th, the request for final deliveries was not made within sixty days therefrom, and if March 15th, then it was not timely, being made, as claimed, on May 14th, the sixtieth day therefrom, and (2) that plaintiff tendered no money to defendant when he made such demand.

manager then said it had not the flour on hand but would get it. Getting no satisfaction from further requests made in the meantime, as he testified, he asked for the rest of the flour on May 12th and offered to pay for the same at the contract price through his bank, presenting from it a letter of credit and assurances of payment. No action seems to have been taken on this request and offer, though Formella testified that defendant refused to make any further delivery. While defendant's manager denied making any refusal and admits receiving such requests and such letter of credit and that he did not require cash payment, there was no further delivery under the contract and no evidence in the record indicating an intention or offer on the part of defendant to make further delivery except that in a conference some days later with reference to a settlement it claimed a willingness to do so provided arrangements for credit were then made.

Elimination of argument, conclusions, assumptions

and recitations of evidentiary facts from defendant's affidavit of defense to ascertain what defense was really stated, and referring only to what was relied on at the trial and argued here, we find the defense to be (1) that if the proper date of the contract was March 12th, the request for final deliveries was not made within sixty days thereafter, and if March 12th, then it was not timely, being made, as claimed, on May 14th, the sixtieth day thereafter, and (2) that plaintiff tendered no money to defendant when he made such demand.

As to the first ground, the contract was drawn by defendant and bore date ^{MARCH} ~~XXX~~ 15th, and was treated in force as from that date, the thirty barrels delivered being considered by defendant as delivered under said contract.

As to tender, if required, we think there was adequate proof of a sufficient offer to meet the requirements of the contract, there being evidence of a readiness, willingness and ability on the part of plaintiff to take the goods. (Sec. 42, Uniform Sales Act.)

The case was tried without a jury. The court held all of defendant's propositions of law except one, which was to the effect that the law implies under such a contract that the flour should be ordered within a reasonable time, within sixty days, holding however in another that under such a contract a demand for delivery on the sixtieth day is not timely and that to put the seller in default the buyer must have made a timely demand for delivery and a legal tender, and the seller must have refused to deliver.

While it is urged that the court's finding and judgment were contrary to the law and the evidence, we think the court's holdings as to the law were applicable to the evidence and consistent with the finding.

While there was some conflict of evidence as to a demand prior to May 12th there was evidence from which the court could have found that there was a request for twenty-five barrels on May 10th, and that defendant disregarded the same and also the request made May 12th for the rest of the flour. Under the circumstances we think this was timely. Defendant did not in fact refuse or fail to deliver on the ground that it was not. The

As to the first ground, the contract was drawn by defendant and bore date ~~XXXX~~ 18th, and was treated in force as from that date, the thirty barrels delivered being considered by defendant as delivered under said contract.

As to tender, if required, we think there was adequate proof of a sufficient offer to meet the requirements of the contract, there being evidence of a readiness, willingness and ability on the part of plaintiff to take the goods. (Sec. 48, Uniform Sales Act.)

The case was tried without a jury. The court held all of defendant's propositions of law except one, which was to the effect that the law implies under such a contract that the flour should be ordered within a reasonable time, within sixty days, holding however in another part under such a contract a demand for delivery on the sixtieth day is not timely and that to put the seller in default the buyer must have made a timely demand for delivery and a legal tender, and the seller must have refused to deliver.

While it is urged that the court's finding and judgment were contrary to the law and the evidence, we think the court's holdings as to the law were applicable to the evidence and consistent with the finding.

While there was some conflict of evidence as to a demand prior to May 18th there was evidence from which the court could have found that there was a request for twenty-five barrels on May 10th, and that defendant disregarded the same and also the request made May 18th for the rest of the flour. Under the circumstances we think this was timely. Defendant did not in fact refuse or fail to deliver on the ground that it was not. The

evidence discloses no offer or intention of defendant to deliver the same, or legal excuse for its failure to fill said order. It did not require cash as a condition of delivery and paid no attention to plaintiff's offer to pay for the rest of the flour at once. It might be inferred that it wished to be relieved from carrying out the contract as the price of flour had risen several dollars a barrel.

It can be said, we think, that defendant gave a practical construction to the contract as not requiring cash on delivery by extending a limited credit on the deliveries it made, as it had done in previous dealings with plaintiff. (Whalen v. Stephens, 193 Ill. 121, 134.) But disregarding evidence bearing upon a practical construction so given, and viewing the contract as a cash sale, delivery and payment were concurrent conditions, (Anglo American Provision Co. v. Prentiss, 157 id. 506, 515) that is to say, as defined by section 42 of the Uniform Sales Act, "the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods." We think the evidence shows readiness and willingness on the part of plaintiff but not on the part of defendant. And it is immaterial if, as claimed by defendant, it offered some days after the time for performance expired to deliver the goods provided an arrangement was then made for credit.

After what was tantamount to defendant's refusal to perform, plaintiff bought of another party sufficient

... evidence discloses no offer on the part of defendant to deliver the goods, or legal excuse for his failure to fill said order. It did not require him to deliver the goods, but it did require him to deliver the goods to plaintiff's order to pay for the cost of the goods. It might be inferred that it was intended to be relieved from carrying out the contract on the part of plaintiff had risen several dollars a barrel.

It can be said, we think, that defendant gave a practical construction to the contract as not requiring cash on delivery by extending a limited credit on the deliveries it made, as it had done in previous dealings with plaintiff. (Union v. Standard, 100 Ill. 101, 104.) The discharging evidence bearing upon a practical construction so given, and viewing the contract as a cash sale, delivery and payment were concurrent conditions. (Amalgamated Provision Co. v. Plaintiff, 107 Ill. 306, 315) That is to say, as defined by section 45 of the Uniform Sales Act, "the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods." We think the evidence shows readiness and willingness on the part of plaintiff but not on the part of defendant. And it is immaterial if, as claimed by defendant, it offered some days after the time for performance expired to deliver the goods provided an arrangement was then made for credit.

After what was tantamount to defendant's refusal to perform, plaintiff's demand of another party sufficient

flour to meet the purposes of his contract. The damages assessed were the difference between what he had to pay therefor and the price agreed on with defendant. We think there was sufficient evidence that plaintiff could not then obtain flour of the grade he had contracted for at a less price than what he paid. There was no such thing as a market price, manufacturer's brands and grades being different, for which each had his own price.

While defendant did not sign the contract it held and acted upon it as a valid instrument which was equivalent to a formal execution. (Vogel v. Pekoc, 157 id. 339, 341; Fortham v. Peters, 206 id. 159, 166.)

We think, therefore, there was no reversible error, that the evidence and law support the court's implied finding that the contract was valid, that it was breached by defendant, that defendant was not ready and willing to perform its part of the contract, that plaintiff was, and also able to, and that he suffered the damages assessed.

It is further urged as error that defendant's manager was required when called to testify under section 33 of the Municipal Court Act to produce papers in response to a subpoena duces tecum and to testify as to market prices of flour. Bearing in mind that the case was tried without a jury and that the evidence was relevant to the issues, and hence admissible at some stage of the proceeding, we find nothing in the manner of the examination or the procedure that we deem prejudicial error.

AFFIRMED.

flour to meet the purposes of his contract. The damages assessed were the difference between what he had to pay therefor and the price agreed on with defendant.

I think there was sufficient evidence that plaintiff could not obtain flour of the grade he had contracted for at a less price than what he paid. There was no such thing as a market price, manufacturer's brands and grades being different, for which each had his own price.

While defendant did not sign the contract it held and acted upon it as a valid instrument which was equivalent to a formal execution. (Vonelf v. Baker, 127 id. 330, 341; Portman v. Peters, 201 id. 155, 156.)

To think, therefore, there was a reversible error, that the evidence and law support the court's implied finding that the contract was valid, that it was breached by defendant, that defendant was not ready and willing to perform its part of the contract, that plaintiff was, and also able to, and that he suffered the damages assessed.

It is further urged as error that defendant's manager was required when called to testify under section 33 of the Municipal Court Act to produce papers in response to a subpoena duces tecum and to testify as to market prices of flour. Bearing in mind that the case was tried without a jury and that the evidence was relevant to the issues, and hence admissible at the stage of the proceeding, we find nothing in the manner of the examination or the procedure that we deem prejudicial error.

ATTEST.

304 - 23649

LUIGI RUSSO FU AGATINO, Appellee,

vs.

LOUIS GINOCCHIO et al., Appellants.

)
Appeal from
Municipal Court
of Chicago.

211 I.A. 416

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

By this action plaintiff Russo, a dealer in almonds located in Sicily, seeks recovery of damages for alleged breach of three different contracts for sale to defendants, trading as partners in Chicago.

The main question is whether there was a meeting of minds in one of the contracts declared on. The original statement of claim alleged a sale to defendants February 3, 1914, for account of plaintiff of a certain quantity and brand of shelled almonds at 120 shillings per hundred weight, designating "shipment September". The statement of claim as amended during the trial alleged that the contract was modified about March 30, 1914, so as to provide "shipment by September 16, 1914", thus counting on a different contract.

The negotiations were had in Chicago with defendant Costa through one Pinder, a local broker, and began about January 30, 1914, by Costa's inquiry of the latter for the price of such almonds for "first half September". Pinder then cabled for price to plaintiff in Sicily as follows: "Lowest 150 bales Palma new crop first half September direct steamer", to which Russo cabled reply "126 September". Costa saying he had price from other

UNITED STATES TO ASSISTING,

Attorneys,

vs.

LOUIS VICTORIO et al.,

Appellants.

FILED

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

By this action plaintiff moved, a dealer in
diamonds located in Italy, seeks recovery of damages for
alleged breach of three different contracts for sale to
defendant, trading as partners in Chicago.

The main question is whether there was a meeting
of minds in one of the contracts declared on. The original
statement of claim alleged a sale to defendant February 1,
1914, for amount of plaintiff of a certain quantity and
brand of shell diamonds of 100 carats per hundred
weight, designated "diamonds December". The statement
of claim as amended during the trial alleged that the con-
tract was modified about March 20, 1914, so as to provide
"diamonds by December 15, 1914", when counting on a
different contract.

The negotiations were had in Chicago with
defendant's agent through one Tabor, a local broker, and
began about January 20, 1914, by Tabor's inquiry of the
factor for the price of such diamonds for "first half
December". Tabor then called for price to plaintiff in
Chicago as follows: "lowest 100 prices from New York first
half December direct shipment", to which Tabor replied "very

shippers at 120 "first half September", Pinder cabled back that the Hamburg market was lower and received cable reply from Russo "I accept 120 September". This reply was verbally communicated to Costa whereupon he, contracting for his firm and understanding that it was a direct response to his inquiry, said he would take 150 bales, and Pinder then, Feb. 3, 1914, cabled Russo "Sold Costa 150 Palma new crop September 120" (meaning 150 bales at 120 shillings per cwt.) and made out a contract in triplicate form for "September shipment", mailing one copy to Russo and another to Costa, which did not, however, come to Costa's personal attention.

In a verbal allusion to the order by Pinder on March 25th, Costa learned that it was sent forward for "September shipment". (which gave the seller the option to ship any time during September) and insisted that it was wrong. Thereupon on the same date Pinder cabled Russo:

"Costa will stipulate * * * latest September 16th * * having understood middle September shipment. Kindly confirm offer Palma boxes September."

To this Russo replied by letter, March 30th, saying:

"I do not understand how you can wire me all of a sudden to change the contract. It was in your very letter of Feby. 3rd. that the deal was confirmed according to my telegrams for shipment in September. You have asked me to confirm and I have done so, but the price for the first half of September is higher than for September, and I must charge you with the difference."

The letter also stated that he had already bought the almonds "for September delivery" and asked for an exhaustive explanation, which Pinder gave in a letter dated April 11th, clearly showing that Costa understood the offer and order to be "shipment for ^{first half} September," and that the misunderstanding grew out of his failure definitely to make known to Costa that Russo's price was for "September" instead of "First half

shipments of 150 "first half September", Binder called back that the shipping market was lower and received cable reply from Messrs "I accept 150 September". This reply was verbally communicated to Costa whereupon he, contacting for his firm and understanding that it was a direct response to his inquiry, said he would take 150 pairs, and Binder then, Feb. 3, 1914, called Messrs "Sole Costa 150 Pairs new crop September 150" (meaning 150 sales at 150 shillings per cwt.) and made out a contract in triplicate form for "September shipment", mailing one copy to Messrs and another to Costa, which did not, however, call to Costa's personal attention. In a verbal allusion to the order by Binder on March 25th, Costa learned that it was sent forward for "September shipment", (which gave the seller the option to ship any time during September) and insisted that it was wrong. Thereupon on the same date Binder called Messrs "Costa will stipulate * * * latest September 15th * * * having understood middle September shipment. Kindly confirm other later before September."

To this Messrs replied by letter, March 26th, saying: "I do not understand how you can wish me all of a sudden to change the contract. It was in your very letter of reply, Sir, that the deal was confirmed according to my telegram for shipment in September. You have asked me to confirm and I have done so, but the price for the first half of September is higher than for September, and I must charge you with the difference."

The latter also stated that he had already bought the almonds "for September delivery" and asked for an explanatory clarification, which Binder gave in a letter dated April 11th, clearly showing that Costa had placed the order and order to be shipment for September, and that the misunderstanding grew out of his failure definitely to make known to Costa that Messrs' price was for "September" instead of "first half

of September" and that his cablegram of March 25th called for the confirmation of Costa's understanding of the contract.

While Russo's letter of March 30th is somewhat ambiguous, and was construed by the trial court as a consent to a modification of the contract, - which would be warranted if we look alone to the proposition therein to hold the broker liable for the difference - yet as a whole the letter indicates Russo's adherence to the terms cabled February 3rd, and such intention was made clear in his letter of May 23rd replying to Pinder's of April 11th and saying:

"I can only confirm what I have said in mine of March 30th. The buyer's reasons do not concern me. For me the deal was closed for September and I beg you to have the letter of credit made out accordingly in due course."

Costa was never informed of this reply and unquestionably supposed the contract had been changed accordingly, whereas there is nothing in the record to indicate that prior to the trial Russo ever changed from the position that the deal was "closed for September".

No further communications respecting this matter were had until in August after the European war broke out, when plaintiff wrote defendants asking them to open credit in order that he might arrange financial affairs before shipment. The banks being unwilling to issue letters of credit at that time, defendants cabled and wrote to that effect on September 2nd, and later, on September 10th, wrote they were obliged "for causes majeure to cancel the entire business". No question is raised but that this constituted a breach of whatever contracts existed between them.

of September" and that his collection of letters with called for the collection of letters, and regarding of the collection.

While Russia's letter of March 1913 is somewhat ambiguous, and was understood by the trial court as a consent to a modification of the contract, - which would be extracted if we look alone to the proposition therein to hold the proper rights for the difference - yet as a whole the letter indicates Russia's adherence to the terms called February 27d, and such intention was made clear in his letter of May 27th replying to Russia's of April 11th and saying:

"I can only confirm what I have said in line of March 20th. The buyer's release is not certain and me. For me the deal was closed for September and I beg you to leave the letter of credit made out accordingly in due course."

Russia was never informed of this reply and unquestionably supposed the contract had been changed accordingly, whereas there is nothing in the record to indicate that prior to the trial Russia ever changed from the position that the deal was closed for September."

No further communication respecting this matter were had until in August after the European war broke out, when plaintiff wrote defendant asking him to open credit in order that he might arrange financial affairs before shipment. The banks being unwilling to issue letters of credit at that time, defendant called and wrote to that effect on September 25th, and later, on September 30th, wrote they were obliged "for business reasons to cancel the entire business". The question is raised but that this constituted a breach of whatever contract existed between them.

But from the foregoing we are clearly of the opinion that the minds of the parties never met in a contract for the 150 bales which they undertook to negotiate for. It is clear from Russo's subsequent correspondence that he did not consent to a "shipment for first half September," but on the contrary continued to adhere to the cablegram of February 3rd for "September shipment", and this was his attitude until he amended his statement of claim during the trial and thus changed the theory of his action. But the change was not by reason of any mistake of fact made in his original statement, and his change of attitude did not change the fact disclosed by the evidence that the minds of the parties never met in a mutual understanding as to the terms of sale for the 150 bales of almonds. From February 3rd, 1914, until the trial March, 1917, plaintiff stood on the terms of the original purchase order and at no time before the trial contended or assumed that they had been modified. All this time Costa, acting for defendants, stood by his original proposition to which the purchase order did not conform, and never assented to the terms of the latter. How, then, can it be said that their minds ever met when during all this time, from the very beginning of the negotiations, one party insisted and relied on one understanding of the terms made and the other on a different understanding, each having reason for his particular understanding. We think it clear that the evidence does not support the court's finding that Russo accepted Costa's terms on March 30. His subsequent letter clearly indicates the contrary, and as the purchase order of February 3rd never expressed Costa's understanding the minds of the parties never met at any stage of the proceedings with

But from the foregoing we are clearly of the opinion that the minds of the parties never met in a contract for the 100 bales which they undertook to negotiate for. It is clear from Ruano's subsequent correspondence that he did not consent to a "shipment for first half shipment," but on the contrary continued to adhere to the obligation of February 2nd for "shipment shipment," and this was his attitude until he amended his statement of claim during the trial and thus changed the theory of his action. But the change was not by reason of any mistake of fact made in his original statement, and his change of attitude did not change the fact disclosed by the evidence that the minds of the parties never met in a contract understanding as to the terms of sale for the 100 bales of almonds. From February 2nd, 1917, until the trial March, 1917, Plaintiff stood on the terms of the original purchase order and at no time before the trial contended or assumed that they had been modified. All this time Costa, acting for defendants, stood by his original proposition to which the purchase order did not conform, and never assented to the terms of the latter. Now, then, can it be said that their minds ever met when during all this time, from the very beginning of the negotiations, one party insisted and relied on one understanding of the terms made and the other on a different understanding, each having reason for his particular understanding. We think it clear that the witness does not support the court's finding that Ruano accepted Costa's terms on March 30. His subsequent letter clearly indicates the contrary, and as the purchase order of February 2nd never expressed Costa's understanding the minds of the parties never met on any stage of the proceedings with

respect to the 150 bales.

The only point made as to the other two contracts is not as to liability but as to the competency of the evidence of damages. We think it clear that the contract called for delivery at the foreign port where the market price during the period for delivery - allowing defendants the highest price during that period - showed a decline of 22 shillings per cwt. making a loss of \$803.55 on the two contracts. The evidence showed that there was no market price at the port of delivery other than or different from that of the foreign port after deducting freight and commissions. In other words, there was no real difference of price at the two ports. Hence there will be a reversal and judgment here against appellant for the amount of the loss on the two contracts aforesaid as thus established.

REVERSED WITH FINDING OF FACT AND
JUDGMENT HERE FOR \$803.55.

respect to the 100 sales.

The only point made as to the other two contracts

is not as to liability but as to the competency of the

evidence of damages. We think it clear that the contract

called for delivery at the foreign port where the market

price during the period for delivery - allowing discounts

the highest price during that period - showed a decline

of 23 millings per cwt. making a loss of 803.25 on the

two contracts. The evidence showed that there was no

market price at the port of delivery other than or different

from that of the foreign port after deducting freight and

commissions. In other words, there was no real difference

of price at the two ports. Hence there will be a reversal

and judgment here against appellant for the amount of the

loss on the two contracts already as first established.

REVEREND JUDGE OF THE COURT
JULIUS ROSS FOR 2003.25.

FINDING OF FACT.

We find that there was no contract entered into between the parties hereto for the sale of 150 bales of almonds as claimed and described in the statement of claim, either as originally filed or as amended.

FINANCIAL FACTS.

We find that there was no contract entered into between the parties hereto for the sale of 150 shares of almonds as claimed and described in the statement of claim, either as originally filed or as amended.

JAKUB ZAMULEWICZ,

Defendant in Error,

vs.

BOLESŁAW JASUDES,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was an action in tort wherein Zamulewicz (plaintiff below) obtained a verdict and judgment against Jasudes (the defendant) on the ground that the latter procured his signature to a contract for the purchase of two lots through false and fraudulent translation and interpretation of the written contract. It is argued that the evidence does not sustain the charge of fraud, and that evidence was improperly admitted. There is no question about the law, and no complaint is made of the instructions given.

On a careful examination of the evidence we find no occasion for disturbing the judgment. The parties hereto and their witnesses were Lithuanians. Plaintiff could neither read nor write English. On the day of his arrival in Chicago defendant undertook to negotiate with him for the purchase of said lots and the evidence tends to show that he agreed to give a clear title to the lots on the payment of \$700 to be paid in installments, plaintiff to pay no interest, taxes or special assessments. Preliminary negotiations to that effect were made in the presence of witnesses, who testified thereto, some of whom

211 I.A. 430

55 - 23957

{
 DEFENDANT IN ERROR,
 JAMES J. JAMNIEWSKI,
 v.
 W.
 PLAINTIFF IN ERROR,
 ROBERTA JAMNIEWSKI,
 OF CHICAGO.
 MUNICIPAL COURT
 ERROR TO

DELIVERED THE OPINION OF THE COURT.
MR. PRESIDING JUDGE BARNES

This was an action in tort wherein Jamniewski
 (plaintiff below) obtained a verdict and judgment against
 Jamniewski (the defendant) on the ground that the latter
 procured his signature to a contract for the purchase
 of two lots through false and fraudulent representation and
 interpretation of the written contract. It is argued
 that the evidence does not sustain the charge of fraud,
 and that evidence was improperly admitted. There is no
 question about the law, and no complaint is made of the
 instructions given.

On a careful examination of the evidence we find
 no occasion for disturbing the judgment. The parties
 hereto and their witnesses were Lithuanians. Plaintiff
 could neither read nor write English. On the day of his
 arrival in Chicago defendant undertook to negotiate with
 him for the purchase of said lots and the evidence tends
 to show that he agreed to give a clear title to the lots
 on the payment of \$700 to be paid in installments, plain-
 till to pay no interest, taxes or special assessments.
 Preliminary negotiations to that effect were made in the
 presence of witnesses, who testified thereto, some of whom

were also present when the contract was brought by defendant and read to plaintiff for signature. None of the parties so present except defendant could read or write English; whereupon defendant purported to read the contract to plaintiff in their presence before it was signed. Plaintiff and these witnesses testified in effect that the contract as so read expressly provided that plaintiff was to pay no interest, taxes or special assessments but was to obtain a clear title for the sum of \$700. Plaintiff was about twenty-one years old, and there was evidence tending to show that Jasudes persuaded him that it was unnecessary to have a lawyer or to show the contract, but that he could rely upon his representation of its contents, and got others in whom he might, in his position as a comparative stranger, expect to have a reasonable degree of confidence, and who had also purchased lots similarly situated, to "coax" him into the purchase. While the contract itself contained no such provisions, and defendant denied mistranslating it, we think there was sufficient evidence to justify the jury's finding of fact that defendant falsely and fraudulently translated the contract to plaintiff under circumstances warranting plaintiff's reliance thereon and his exercise of reasonable prudence, and read into it provisions which it did not contain, and that plaintiff relying upon such translation as correct was induced to sign the contract. He paid \$675 thereon and offered to pay the other \$25, the balance as he understood the contract, but the land had been sold in the meantime for taxes and special assessments, for which he refused to pay, and without the payment of which defendant refused to give a deed to the property. The verdict of the jury was for the sum of money he thus paid on the contract.

were also present when the contract was produced by defendant and read to plaintiff for signature. None of the parties so present except defendant could read or write English; whereupon defendant purported to read the contract to plaintiff in their presence before it was signed. Plaintiff and these witnesses testified in effect that the contract as so read expressly provided that plaintiff was to pay no interest, taxes or special assessments but was to obtain a title for the sum of \$500. Plaintiff was about twenty-one years old, and there was evidence tending to show that defendant persuaded him that it was unnecessary to have a lawyer or to know the contract, but that he could rely upon his representation of its contents, and that others, in whom he might, in his position as a comparative stranger, expect to have a reasonable degree of confidence, and who had also purchased lots similarly situated, to "close" him into the purchase. While the contract itself contained no such provisions, and defendant denied misrepresenting it, we think there was sufficient evidence to justify the jury's finding of fact that defendant falsely and fraudulently translated the contract to plaintiff under circumstances warranting plaintiff's reliance thereon and his exercise of reasonable prudence, and read into it provisions which it did not contain, and that plaintiff relying upon such translation as correct was induced to sign the contract. He paid \$675 thereon and offered to pay the other \$125, the balance as he understood the contract, but the land had been sold in the meantime for taxes and special assessments, for which he refused to pay, and without the payment of which defendant refused to give a deed to the property. The verdict of the jury was for the sum of money he thus paid

The testimony complained of was to the effect that Jasudes subsequently told others that he had agreed to return plaintiff his money with interest at 10 per cent in two years if he was dissatisfied with his bargain. There was evidence, which this had some tendency to corroborate, that the contract as translated by Jasudes contained such a provision. But if not admissible, the judgment should not be reversed on that account in view of the fact that there was sufficient evidence of fraudulent representations as to other matters to justify the recovery. The judgment will be affirmed.

AFFIRMED.

The testimony complained of was to the effect that Janssen subsequently told others that he had agreed to return plaintiff's money with interest at 10 per cent in two years if he was dissatisfied with the bargain. There was evidence, which this had gone far away to corporate, that the contract as framed by Janssen contained such a provision. But if not admissible, the judgment should not be reversed on that account in view of the fact that there was sufficient evidence of fraudulent representations as to cover actions to justify the recovery. The judgment will be affirmed.

REVEREND.

271 - 23616

THE OZONIZED OX MARROW
COMPANY, a corporation,

Appellant,

vs.

M. L. BARRETT &
COMPANY, a
corporation,

Appellee.

211 I.A. 421

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant, the Ozonized Ox Marrow Company, brought an action for the value of a quantity of "washed oil of orange" delivered to the appellee. The court found the issues for the defendant, and from the judgment entered thereon plaintiff has prosecuted this appeal.

The statement of claim filed on behalf of plaintiff set forth that its claim was for "washed oil of orange sold and delivered as per sample to the defendant," etc. The affidavit of defense alleged substantially that plaintiff had offered to sell to the defendant a certain quantity of "oil of orange" at a certain price, at which time plaintiff submitted to defendant a sample of a substance which plaintiff informed defendant was "oil of orange," but that it was not at that time understood nor did the agreement contemplate a sale of a product like the sample, but that it was expressly represented by plaintiff that the product offered for sale was "oil of orange;" that thereafter defendant placed an order for 250 pounds of "oil of orange;" that defendant received from plaintiff 250 pounds of "washed oil of orange;" that thereupon, within a reasonable time, defendant notified plaintiff that the shipment was not in accordance with representations made,

U.S.A. 421

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

THE CHICAGO OIL COMPANY,
a corporation,

Appellant,

vs.

M. I. BARNETT COMPANY,
a corporation,

Appellee.

THE JUDICIAL RECORDS DELIVERED THE ORIGIN OF THE COURT.

Appellant, the Chicago Oil Company, brought

an action for the value of a quantity of "washed oil of
orange" delivered to the appellee. The court found the
issues for the defendant, and from the judgment entered
thereon plaintiff has presented this appeal.

The statement of claim filed on behalf of plaintiff

set forth that its claim was for "washed oil of orange sold
and delivered as per sample to the defendant," etc. The
allegation of defense alleged substantially that plaintiff
had offered to sell to the defendant a certain quantity of
"oil of orange" at a certain price, at which time plaintiff
submitted to defendant a sample of a substance which plaintiff
informed defendant was "oil of orange," but that it was
not at that time understood nor did the agreement contemplate
a sale of a product like the sample, but that it was
expressly represented by plaintiff that the product
offered for sale was "oil of orange;" that thereafter
defendant placed an order for 500 pounds of "oil of
orange;" that defendant received from plaintiff 250
pounds of "washed oil of orange;" that thereupon, within
a reasonable time, defendant notified plaintiff that the
shipment was not in accordance with representations made,

and that it was being held subject to plaintiff's orders; and that defendant has ever since been ready and willing to surrender it to plaintiff.

The evidence offered on behalf of the plaintiff tended to show that the shipment in question was not represented as "oil of orange" in its common acceptation, but as "oil of orange with something taken from it and something added to it;" that a sample thereof had been submitted to defendant, who, after an examination of the sample submitted, ordered 250 pounds thereof as per sample; that it was a sale by sample only, and that the commodity delivered was in every respect like the sample submitted.

On behalf of the defendant evidence was adduced tending to show that plaintiff had offered defendant "oil of orange" at \$1.75 per pound, - a figure considerably lower than the then prevailing market price; that defendant agreed to purchase same at the said price provided it was "oil of orange" in accordance with the formula of the United States Pharmacopoeia, a recognized authority on chemical standards; that plaintiff submitted a sample thereof to the defendant which had the appearance and aroma of "oil of orange," whereupon defendant ordered 250 pounds of "oil of orange" for immediate delivery; that a few days later defendant received from plaintiff ten containers each containing 25 pounds of a substance known as "washed oil of orange," as indicated by the markings on the containers and as revealed by a chemical analysis; that thereupon defendant rejected the shipment, immediately notifying plaintiff that it was being held subject to its order. The evidence on behalf of defendant further showed that "washed oil of orange" is an entirely different product and greatly inferior to "oil of orange."

and that it was being held subject to Plaintiff's orders; and that defendant has ever since been ready and willing to surrender it to Plaintiff.

The evidence offered on behalf of the Plaintiff

tended to show that the shipment in question was not represented as "oil of orange" in its common acceptance, but as "oil of orange with something taken from it and something added to it," that a sample thereof had been

submitted to defendant, who, after an examination of the sample submitted, ordered 250 pounds thereof as per sample; that it was a sale by sample only, and that the commodity delivered was in every respect like the sample submitted.

On behalf of the defendant evidence was adduced

tending to show that Plaintiff had offered defendant "oil of orange" at \$1.75 per pound, - a figure considerably lower than the then prevailing market price; that defendant agreed to purchase same at the said price provided it was "oil of orange" in accordance with the formula of the United States Pharmacopoeia, a recognized authority on chemical standards;

that Plaintiff submitted a sample thereof to the defendant which had the appearance and odor of "oil of orange," whereupon defendant ordered 250 pounds of "oil of orange" for immediate delivery; that a few days later defendant received

from Plaintiff ten containers each containing 25 pounds of a substance known as "essence oil of orange," as indicated by the markings on the containers and as revealed by a chemical analysis; that thereupon defendant rejected the shipment, immediately notifying Plaintiff that it was being held subject to its order. The evidence on behalf of defendant further showed that "essence oil of orange" is an entirely different product and greatly inferior to "oil of orange."

Plaintiff contends that the court erred in finding the issues for the defendant.

It is a well recognized principle of the law of sales that where goods are sold by sample and representation, the fact that they conform to the sample submitted is not sufficient, but they must be in accordance with the representation as well. (Wabash Canning Co. v. Nicholls, 187 Ill. App. 176 and cases there cited.) Plaintiff, while apparently conceding this, argues that the evidence clearly shows that this was a sale by sample only and that the commodity delivered to defendant conformed in every respect thereto, and that hence plaintiff was entitled to recover the value thereof. The court evidently based its holding upon defendant's theory, viz., that the sale in question was upon sample and representation that the commodity sold was "oil of orange" and that plaintiff delivered "washed oil of orange" instead; consequently, unless we are prepared to hold that the finding of the court is clearly and manifestly against the weight of the evidence, it cannot be disturbed. The evidence on this point was conflicting and for this reason the credibility of the witnesses must have been a determining factor. In such a situation we cannot say that the finding of the court is clearly and manifestly against the weight of the evidence.

Complaint is also made of the admission of evidence of a custom in the chemical industry that the term "oil of orange" can refer to only one certain commodity, viz., that conforming to the formula of the United States Pharmacopoeia, because the plaintiff was not in the chemical or drug business and therefore could not be charged with knowledge of any such custom even though it existed. However, the evidence on behalf of the defendant showed that

Plaintiff contends that the court erred in finding

the issues for the defendant.

It is a well recognized principle of the law of

sales that where goods are sold by sample and representation,

the fact that they conform to the sample submitted is not

sufficient, but they must be in accordance with the representa-

tion as well. (Lambert v. Lumber Co., 187 Ill. App.

156 and cases there cited.) Plaintiff, while apparently

conceding this, argues that the evidence clearly shows that

this was a sale by sample only and that the commodity delivered

to defendant conformed in every respect thereto, and that hence

plaintiff was entitled to recover the value thereof. The court

evidently based its holding upon defendant's theory, viz., that

the sale in question was upon sample and representation that the

commodity sold was "oil of orange" and that plaintiff delivered

"scented oil of orange" instead; consequently, unless we are

prepared to hold that the finding of the court is clearly and

manifestly against the weight of the evidence, it cannot be

disturbed. The evidence on this point was conflicting and for

this reason the credibility of the witnesses must have been

a determining factor. In such a situation we cannot say

that the finding of the court is clearly and manifestly

against the weight of the evidence.

Complaint is also made of the admission of

evidence of a custom in the chemical industry that the term

"oil of orange" can refer to only one certain commodity,

viz., that contained in the formula of the United States

Pharmacopoeia, because the plaintiff was not in the chemical

or drug business and therefore could not be charged with

knowledge of any such custom even though it existed. How-

ever, the evidence on behalf of the defendant showed that

plaintiff had expressly agreed to deliver "oil of orange" in conformity with said formula. Plaintiff is therefore in no position to complain of the admission of this evidence.

Other errors have been assigned which we need not discuss, save to say that they are without merit. There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

plaintiff has explicitly agreed to deliver "oil of crabs"
in conformity with said formula. Plaintiff is therefore
in no position to complain of the admission of this evidence.
Other errors have been assigned which we need not
discuss, save to say that they are without merit. There
being no error in the record which justifies a reversal,
the judgment will be affirmed.

AFFIRMED.

THE COURT OF APPEALS IN THIS CASE HAS REVERSED THE JUDGMENT OF THE TRIAL COURT AND HAS ORDERED THAT THE CASE BE REMANDED TO THE TRIAL COURT FOR A NEW TRIAL. THE COURT OF APPEALS HAS FOUND THAT THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO SUSTAIN THE VERDICT IN FAVOR OF THE PLAINTIFF. THE COURT OF APPEALS HAS ALSO FOUND THAT THE DEFENDANT WAS NOT GIVEN A FAIR TRIAL. THE COURT OF APPEALS HAS THEREFORE ORDERED THAT THE CASE BE REMANDED TO THE TRIAL COURT FOR A NEW TRIAL. THE COURT OF APPEALS HAS ALSO ORDERED THAT THE COSTS OF THE APPEAL BE PAID BY THE PLAINTIFF.

L. SANTOWSKY for use of
Bank of Wisconsin, a
corporation,

Appellee,

vs.

FIRST NATIONAL BANK OF
CHICAGO and

CHICAGO METAL REFINING
COMPANY, a corporation,
Intervening Petitioner,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 422

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment against the First National Bank of Chicago in a garnishment proceeding brought for the use of the Bank of Wisconsin, in which the Chicago Metal Refining Company filed a petition as intervening claimant.

Prior to the bringing of the garnishment proceeding the said Bank of Wisconsin had recovered a judgment for upwards of \$2,000 against Louis Santowsky, upon which execution was issued and returned no part satisfied. Subsequently the First National Bank of Chicago was served as garnishee. Answers to interrogatories propounded to it revealed that at the time it was served as garnishee there stood to the credit of the said Santowsky the sum of \$941.71, being a balance of a checking account, subject to prior assignment thereof from the said Santowsky to the said Chicago Metal Refining Company, which sum the said bank had since paid in full to the said Chicago Metal Refining Company. On motion of the appellee, the said Chicago Metal Refining Company was made a party to the suit as intervening claimant to the said fund.

CHICAGO
MUNICIPAL COURT
BY DEED.

CHICAGO METAL REFINING
COMPANY, a corporation,
Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING
COMPANY, a corporation,
Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING
COMPANY, a corporation,
Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING
COMPANY, a corporation,
Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING COMPANY, a corporation, Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING COMPANY, a corporation, Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING COMPANY, a corporation, Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

CHICAGO METAL REFINING COMPANY, a corporation, Plaintiff,
vs.
JAMES H. HARRIS, Defendant.

At the close of all the evidence the court found the issues for appellee and ordered the said First National Bank of Chicago to pay over to the said Santowsky for the use of the Bank of Wisconsin, the said sum of \$941.71.

It is contended that the court erred in its findings and in ordering said fund paid to the said Santowsky for the use of the said Bank of Wisconsin.

The action of the court in so finding and ordering was based upon the theory that the purported assignment of the fund from the said Santowsky to the said Chicago Metal Refining Company was void as being in fraud of creditors and without consideration. From a careful examination of the record, we are of the opinion that the theory of the trial court was amply sustained by the evidence. Accordingly the judgment will be affirmed.

AFFIRMED.

At the close of all the evidence the court found the issues for appeal and ordered the said First National Bank of Chicago to pay over to the said Eastway for the use of the Bank of Wisconsin, the said sum of \$441.71. It is contended that the court erred in its findings and in ordering said fund paid to the said Eastway for the use of the said Bank of Wisconsin. The action of the court in so finding and ordering was based upon the theory that the purported assignment of the fund from the said Eastway to the said Bank of Wisconsin Refining Company was valid as being in favor of creditors and without consideration. From a careful examination of the record, we are of the opinion that the theory of the trial court was amply sustained by the evidence. Accordingly the judgment will be affirmed.

AFFIRMED.

THE J. L. MOTT IRON WORKS,
a corporation,

Appellee.

vs.

NATHAN ROSENZWEIG,

Appellant.

211 I.A. 430

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1902.05 rendered in an action on a promissory note, in which appellant, Nathan Rosenzweig, was sued as indorser and his co-defendant, the Maimonides Hospital, as maker; the appeal being prosecuted by Nathan Rosenzweig alone.

The sole question presented for determination is whether or not the trial court erred in sustaining an objection to certain evidence offered on behalf of the appellant. The evidence tendered related to an agreement alleged to have been made by appellee with the said hospital some time prior to the execution of the note in question, to the effect that in consideration of the sum of \$300 appellant, who was a plumbing contractor, was to permit certain plumbing supplies used in the construction of the said hospital, to be ordered and shipped in his name, and was to be made payee of the note herein sued upon, which said note was to be indorsed by him and given in payment of the said supplies, and that no liability was to be incurred by him on said note. In our opinion, this evidence was properly excluded. The general rule is, that the name of the payee on the back of a note is evidence that he is an indorser and proves that he has assumed the liability of an indorser, as fully as if the agreement had been

211 I.A. 430

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

THE J. L. MOTT IRON WORKS,
a corporation,
Appellee,
vs.
NATHAN ROSENBERG,
Appellant.

MR. JUSTICE McFARLAND DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$200.00

tendered in an action on a promissory note, in which
appellant, Nathan Rosenberg, was sued as maker and his
co-defendant, the Malmonides Hospital, as maker; the appeal
being prosecuted by Nathan Rosenberg alone.

The sole question presented for determination
is whether or not the trial court erred in sustaining an
objection to certain evidence offered on behalf of the
appellant. The evidence tendered related to an agreement
alleged to have been made by appellee with the said hospital,
some time prior to the execution of the note in question,
to the effect that in consideration of the sum of \$200
appellant, who was a plumbing contractor, was to permit
certain plumbing supplies used in the construction of the
said hospital, to be ordered and shipped in his name, and
was to be made payee of the note herein sued upon, which
said note was to be indorsed by him and given in payment
of the said supplies, and that no liability was to be
incurred by him on said note. In my opinion, this evidence
was properly excluded. The general rule is, that the name
of the payee on the back of a note is evidence that he is
an indorser and proves that he has assumed the liability

written out in words. Parol evidence is no more admissible to contradict or vary this contract than any other contract. Johnson v. Glover, 121 Ill. 283.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

written and in words. Parol evidence is no more admissible
to contradict or vary this contract than any other contract.

Lorner v. River, 121 Ill. 233.

There being no error in the record which justifies

a reversal the judgment will be affirmed.

AFFIRMED.

AUTO PARTS COMPANY, a
corporation,
Appellee,

vs.

JOSEPH SILVERSTEIN and
SAM GOODMAN,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

211 I.A. 436

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered by the court in favor of the complainant, the Auto Parts Company, a corporation of Illinois, which sued appellants Joseph Silverstein and Sam Goodman as copartners.

The bill of complaint charged unfair competition. It alleged that complainant, an Illinois corporation, was for many years engaged in the business of buying and selling secondhand automobiles, parts, supplies, etc.; that by the expenditure of large sums of money for advertising and by fair dealing, a large and lucrative business was acquired by it in the United States and foreign countries; that the defendants Silverstein and Goodman afterwards became associated in a similar business taking the firm name and style of "Auto Sales and Parts Company"; that the name was so similar to that of complainant as to cause customers of complainant to believe while dealing with defendants that they were dealing with complainant; that defendants were notified of the confusion resulting from the use of this name, but nevertheless continued so to use it and were doing so for the purpose of causing confusion and for the fraudulent purpose of misleading complainant's customers.

45 - 31884

APPROPRIATE COMPANY,
CORPORATION,
APPROPRIATE

• 85

Appellants.

HONG KONG

RECEIVED

COOK COUNTY.

ST. I. A. 436

W. J. LESTER, MANAGER, 1111 THE OCEAN.

This is an appeal from a decree entered by the court in favor of the complainant, the Lutz Company, a corporation of Illinois, which said complainant Joseph Silverstein and Sam Weisman as co-defendants.

The bill of complaint charges unfair competition. It alleges that complainant, an Illinois corporation, was for many years engaged in the business of buying and selling secondhand automobiles, parts, supplies, etc.; that by the expenditure of large sums of money for advertising and by fair dealing, a large and lucrative business was acquired by it in the United States and foreign countries; that the defendants Silverstein and Goodman afterwards became associated in a similar business taking the firm name and style of "Auto Sales and Parts Company"; that the name was so similar to that of complainant as to cause confusion of complainant to believe while dealing with defendants that they were dealing with complainant; that defendants were notified of the confusion resulting from the use of this name, but nevertheless continued so to use it and were using it for the purpose of causing confusion and for the fraudulent purpose of obtaining complainant's customers.

The answer of the defendants denied that the name "Auto Sales & Parts Company" was similar to that of "Auto Parts Company" and denied that confusion resulted from the use of the same, or that they were guilty of the unfair dealing as charged.

The cause was referred to a master who in his report found the business of complainant was begun in 1906 and incorporated two years thereafter; that it had grown until in the year 1915, its business totaled \$730,000; that it was the largest concern in the world selling auto parts and had an excellent reputation for square dealing and good service; that the defendants originally conducted a junk business which later was combined with the sale of auto parts and accessories as one business, and that the business transacted by them amounted to about \$25,000 per year; that there was confusion as to the identity of the two organizations; that the resemblance of the names was calculated to deceive the ordinary, everyday person; that defendants had not acted in good faith; that orders sent through the mail were mixed and confused; that people had been and were likely to be induced to deal with the Auto Sales & Parts Company with the idea that they were purchasing goods of the Auto Parts Company and defendants had so conducted themselves as to aid in this deception. The report recommended an injunction and the chancellor entered a decree in accordance with its recommendations and the prayer of the bill.

The law applicable to cases of this kind has been often announced. A corporation in business is entitled to protection in the use of the name under which it is incorporated to the same extent as an individual would be entitled to protection in the use of his individual name. The right to this protection is recognized in statutes of

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the state, Hurd's Revised Statutes, Chap. 32, Sec. 2, and in the decisions of the courts. Merchants' Detective Ass'n. v. Detective Mercantile Agency, 25 Ill. App. 250; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n. et al., 246 Ill. 416. While names which are generic terms or merely descriptive are the common property of the public, and a private property interest therein cannot be acquired, (The Elgin Butter Co. v. The Elgin Creamery Company et al., 155 Ill. 127) nevertheless, the courts will grant relief where a name of this kind has been adopted under circumstances which make it appear that the purpose of adopting such name was to mislead the general public. International Com. Y. W. C. A. v. Y. W. C. A., 194 Ill. 194; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n., 246 Ill. 416. One cannot use even his own name in such a manner as to deceive. Allegretti et al. v. Allegretti Chocolate Cream Company, 177 Ill. 129. It is also the law that irrespective of fraudulent intent, or actual injury, it is the duty of a subsequent trader to adopt affirmative precautions sufficient to make confusion and deception improbable. 28 Amer. & Eng. Ency. of Law, p. 422-3, and cases there cited.

The particular facts and circumstances which appear in evidence in each case determine whether relief can or cannot be granted.

Appellants urge that the evidence is insufficient to support the findings of the master and the decree entered by the court and claim that a search of the entire evidence fails to show a single instance of false representation.

We have given the evidence careful consideration. While it is true as appellants urge that fraud is never

the state, under a Revised Statutes, Chap. 32, Sec. 2, and in the decisions of the courts. Verdant's, Detective Ass'n. v. Detective Verdon's Agency, 111. A. 250; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n. et al., 246 Ill. 416. While names which are generic terms or merely descriptive are the common property of the public, and a private property interest therein cannot be acquired, (The Alvin Butter Co. v. The Alvin Creamery Company et al., 115 Ill. 127) nevertheless, the courts will grant relief where a name of this kind has been adopted under circumstances which make it appear that the purpose of adopting such name was to mislead the general public. International Com. Y. I. C. A. v. Y. I. C. A., 194 Ill. 194; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n. 246 Ill. 418. One cannot use even his own name in such a manner as to deceive. Allegretti et al. v. Allegretti Chocolate Cream Company, 117 Ill. 129. It is also the law that irrespective of fraudulent intent, or actual injury, it is the duty of a subsequent trader to adopt affirmative precautions sufficient to make confusion and deception improbable. 28 Amer. & Eng. Incy. of Law, p. 432-3, and cases there cited.

The particular facts and circumstances which appear in evidence in each case determine whether relief can or cannot be granted.

Appellants urge that the evidence is insufficient to support the findings of the master and the jury entered by the court and claim that a search of the entire evidence fails to show a single instance of false representation. We have given the evidence careful consideration. While it is true as appellants urge that fraud is never

presumed and must always be clearly proved, we think there is evidence in this record from which the chancellor could properly find a fraudulent intention. The name adopted by the defendants was one well calculated to lead to confusion and deceive the customers of complainant. The use of the name resulted in confusion. This is established by the testimony of the post office employee who was in charge of distributing the mail of these two concerns. The complainant was the older company, doing a larger business. It had been established for many years and had expended large sums of money in advertising. The defendants began to transact a similar business. This they had a perfect right to do, but there is no sufficient explanation in this record as to their reason for deliberately choosing a name so similar to that of the larger and older concern, and their insistence upon using it other than the desire on their part to appropriate to their own use the good will and business of appellee.

We have searched the record in vain for facts from which an innocent intention might be inferred. The findings of the master when approved as here by the chancellor are entitled to great weight. We have no right to set them aside unless they are clearly and manifestly against the weight of the evidence. Champion et al. v. McCarthy, 228 Ill. 87; Day v. Wright, 233 Ill. 218.

We cannot in this case say that these findings are contrary to the weight of the evidence, but on the contrary think the evidence clearly tends to establish the intention of appellants to deceive and defraud. At any rate it is established defendants failed as subsequent traders doing a similar business to that of appellee, to fulfill the duty which the law cast upon them to adopt affirmative

presumed and must always be clearly proved, we think there is evidence in this record from which the chancellor could properly find a fraudulent intention. The name adopted by the defendants was one well calculated to lead to confusion and deceive the customers of complainant. The use of the name resulted in confusion. This is established by the testimony of the post office employee who was in charge of distributing the mail of these two concerns. The complainant was the older company, doing a larger business. It had been established for many years and had expended large sums of money in advertising. The defendants began to transact a similar business. This they had a perfect right to do, but there is no sufficient explanation in this record as to their reason for deliberately choosing a name so similar to that of the larger and older concern, and their insistence upon using it other than the desire on their part to appropriate to their own use the good will and business of appellee.

We have searched the record in vain for facts from which an innocent intention might be inferred. The findings of the master who approved as here by the chancellor are entitled to great weight. We have no right to set them aside unless they are clearly and manifestly against the weight of the evidence. Champion et al. v. McCarthey, 233 Ill. 87; Day v. Wright, 233 Ill. 215.

We cannot in this case say that these findings are contrary to the weight of the evidence, but on the contrary think the evidence clearly tends to establish the intention of appellants to deceive and defraud. At any rate it is established defendants failed as subsequent traders doing a similar business to that of appellee, to fulfill

precautions sufficient to make deception improbable. Whether on the ground of this neglect of duty, or active fraud, the decree is sustained by the evidence.

Objection is made by appellants to the costs taxed for master's fees. It appears from the amended certificate of the master he had taken 8,266 folios of testimony of which 405 folios were written by the stenographer and 7,861 folios were documentary. The statutory charge therefor would amount to \$1239.90. The master asked that the fees "to be fixed by the court" for drafting report etc. be taxed at the sum of \$150.00. The court after hearing the evidence fixed the total allowance for master's charges in the case at \$447.60. As this was much less than the statutory fees for taking and reporting the evidence, we think appellants have no just cause to complain. We do not think there was error either in the taxing of these fees, or in the further reference to the master.

For the reasons indicated the decree of the trial court will be affirmed.

AFFIRMED.

precautions sufficient to make deception improbable. Neither on the ground of this neglect of duty, or active fraud, the decree is sustained by the evidence.

Objection is made by appellants to the costs taxed for master's fees. It appears from the appended certificate of the master he had taken 8,712 folios of testimony of which 408 folios were written by the stenographer and 7,861 folios were documentary. The statutory charge the referee would award to 1233.90. The master asked that the fees "to be fixed by the court" for drafting report etc. be taxed at the sum of 110.00. The court after hearing the evidence fixed the total allowance for master's charges in the case at 1447.60. As this was much less than the statutory fees for taking and reporting the evidence, we think appellants have no just cause to complain. We do not think there was error either in the fixing of these fees, or in the further reference to the master.

For the reasons indicated the orders of the trial

court will be affirmed.

ATTORNEYS.

EDSON R. GILBERT and WILLIAM
H. DUNN,

Appellants.

vs.

ROBERT M. SWEITZER, County
Clerk of Cook County, et al.,
Appellees.

211 I.A. 438

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The complainants and appellants Edson R. Gilbert and William H. Dunn, filed their bill of complaint in the Superior Court of Cook County, March 30, 1917. They sued as citizens and tax payers to enjoin defendants and appellees Robert M. Sweitzer as County Clerk of Cook County and Henry Stuckart as County Treasurer of said county from taking action towards the payment of any money out of the public funds of Cook County for salaries to 115 persons holding the positions of Probation Officers in the Juvenile Court of Cook County.

The bill sets up at length the provisions of the Constitution of Illinois, Article 10, Section 9, and Hurd's Rev. Statutes, Chap. 25, Sec. 22, with reference to the powers and duties of clerks of courts of Cook County, and the duty of the judges of the Circuit Court to fix the number of deputies or assistants of the court each year.

It alleges that on December 12, 1916, the judges of the Circuit Court entered an order by which they allowed to the Clerk of the Circuit Court of Cook County as ex-officio Clerk of the Juvenile Court in said County, deputies and assistants to the number of 12, specified in said order as vault clerk, bookkeeper, chief clerk, minute clerk, record

884.A.1112.

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CLARK OF COCK COUNTY, ALA.
SHERIFF.

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7647.

RECEIVED THE OFFICE OF THE SECRETARY OF THE ARMY

The complainant and respondent herein, Gilbert and William H. Mann, filed their bill of complaint in the Superior Court of Cook County, March 26, 1917. They sued to obtain and tax payers to enforce defendants and to obtain a writ of habeas corpus from the County Clerk of Cook County and Henry Jackson, County Treasurer of said County from taking action towards the payment of any money out of the public funds of Cook County for salaries to all persons holding the position of Probation Officers in the Juvenile Court of Cook County.

The bill sets up at length the provisions of the Constitution of Illinois, Article IV, Section 2, and Article IV, Section 3, with reference to the powers and duties of clerks of courts of Cook County, and the duty of the judges of the Circuit Court to fix the number of deputies or assistants of the court each year. It alleges that on December 12, 1916, the judges of the Circuit Court entered an order by which they allowed to the Clerk of the Circuit Court of Cook County an ex-officio clerk of the Juvenile Court in said County, deputies and assistants to the number of 12, specified in said order as

writers, decree writers, filing and process clerk and file and docket clerk; that in and by the same order the said judges directed in substance and effect that offices should exist during said fiscal year beginning December 1, 1916, and ending November 30, 1917, in connection with the Juvenile Court in said Cook County, and the officers were named as follows: seventy seven "Assistant Probation Officers"; one was named "Director of Juvenile Psychopathic Institute"; one as "Assistant Director Juvenile Psychopathic Institute"; two "Junior Stenographers Psychopathic Institute"; one "Woman Probation Officer (a lawyer) who shall act as assistant to Judge of the Juvenile Court"; three "Assistant Probation Officers - Court Stenographers"; five "Junior Stenographers"; five "Junior Typists"; one "Chief Probation Officer"; one "Deputy Chief Probation Officer"; five "Probation Department Clerks"; one "Assistant Probation Officer - secretary to the Judge"; five "Assistant Probation Officers - Heads of Divisions"; one "Assistant Probation Officer - for foreign languages"; one "Assistant Probation Officer - Interpreter"; one "Assistant Probation Officer - nurse"; two "Assistant Probation Officers - to place and supervise delinquent boys on farms"; one "Assistant Probation Officer - to handle contempt cases"; one "Assistant Probation Officer - special work"; that the said order was made under and by virtue of a certain statute entitled "An Act to regulate the Treatment and Control of Dependent, Neglected and Delinquent Children", approved April 21, A. D. 1899, as amended, commonly known as the "Juvenile Court Act," Hurd's Illinois Revised Statutes, Chap. 23, Sec. 174; that the clerk of the Circuit Court made no petition for the appointment of these officers or

writers, secretaries, filing and process clerk and file and docket clerk; that in and by the same order the said judges directed in substance and effect that officers should exist during said fiscal year beginning December 1, 1916, and ending November 30, 1917, in connection with the Juvenile Court in said Cook County, and the officers were named as follows: seventy seven "Assistant Probation Officers"; one was named "Director of Juvenile Psychopathic Institute"; one as "Assistant Director Juvenile Psychopathic Institute"; two "Junior stenographic typists"; one "Senior Probation Officer (a lawyer) who shall act as assistant to Judge of the Juvenile Court"; three "Assistant Probation Officers - Court stenographers"; five "Junior stenographers"; five "Junior typists"; one "Chief Probation Officer"; one "Deputy Chief Probation Officer"; five "Probation Department Clerks"; one "Assistant Probation Officer - secretary to the Judge"; five "Assistant Probation Officers - heads of divisions"; one "Assistant Probation Officer - for foreign languages"; one "Assistant Probation Officer - interpreter"; one "Assistant Probation Officer - nurse"; two "Assistant Probation Officers - to place and supervise delinquent boys on farms"; one "Assistant Probation Officer - to handle contempt cases"; one "Assistant Probation Officer - special work"; that the said order was made under and by virtue of a certain statute entitled "an act to reorganize the President and Council of Dependent, Neglected and Delinquent Children", approved April 21, A. D. 1900, as amended, commonly known as the "Juvenile Court Act". Hurd's Illinois Revised Statutes, Chap. 10, Sec. 174; that the clerk of the Circuit Court made no objection to the appointment of these officers or

employees; that said appointments were made by the judges of the Circuit Court pursuant to the recommendation of a committee of said judges, a copy of which is attached to the bill and made a part thereof, marked "Exhibit A".

That on February 19th, 1917, the Board of Commissioners of Cook County, passed their annual appropriation bill in and by which they fixed the salaries of said offices amounting to the total sum of \$154,680.00, and appropriated that sum with which to pay the salaries of these officers as they should become due, out of the public funds of said Cook County; that defendant Sweitzer as County Clerk had issued warrants for the payment to the persons holding said positions of these salaries for the latter half of the month of March, 1917, and that Henry Stuckart as County Treasurer was about to counter-sign and pay said warrants out of the public funds; that the said Juvenile Court is a part of the Circuit Court of Cook County; that it is the statutory duty of the clerk to attend all its sessions, not excepting the "Juvenile Court" and keep the records thereof and all other duties pertaining to said office of clerk; that said order of December 12th entered by said judges is without warrant of law, and the appropriation of the said County Board also is without warrant of law; that a considerable part of the duties conferred on the clerk of the Circuit Court by law had been taken from him so far as the Juvenile Court is concerned, and entrusted to said named offices; that ^{this} has resulted in a duplication of clerks and necessitated a large increase in the amount of space required in which to keep the files and records of said Circuit Court, including the Juvenile Branch thereof; that a part of the said records are kept

Branch thereof; that a part of the said records are kept in the custody of said Circuit Court, including the Juvenile Court; that the records required in order to keep the files a duplication of clerks and necessitate a large increase and estimated to said named offices; that this has resulted in taken from him so far as the Juvenile Court is concerned, conferred on the clerk of the Circuit Court by law had been warrant of law; that a considerable part of the duties appropriation of the said County Court also is without entered by said judges in without warrant of law, and the to said office of clerk; that said order of December 1917 and keep the records thereof and all other duties pertaining attend all its sessions, not excepting the Juvenile Court County; that it is the statutory duty of the clerk to Juvenile Court is a part of the Circuit Court of Cook County; that the said warrants out of the public funds; that the said Juvenile Court Treasurer was bound to counter-sign and latter half of the month of March, 1917, and that Henry persons holding said positions of these salaries for the as County Clerk had issued warrants for the payment to the public funds of said Cook County; that defendant twelfth of these officers as they should become due, out of the and appropriated that sum with which to pay the salaries of said officers amounting to the total sum of \$154,630.00, appropriation bill in and by which they fixed the salaries Commissioners of Cook County, passed their annual that on February 19th, 1917, the Board of the bill and made a part thereof, marked "Exhibit A". committee of said judges, a copy of which is attached to of the Circuit Court pursuant to the recommendation of a employees; that said appointments were made by the judges

secret and are not open to the inspection of the public as required by law; that "your orators" are advised and believe that the said statutory provision for the multiplication of probation officers is unconstitutional and void as construed in Witter v. Cook County Commissioners, 256 Ill. 616; that the power of appointment of all probation officers in said Juvenile Court is vested solely in the judges of the Circuit Court of Cook County, and that the Board of Commissioners of Cook County have no power whatever in reference thereto.

The foregoing allegations of the bill are contained in paragraphs 1 to 17 thereof. Paragraphs 18 to 23 allege that the statute in question violates section 3 of the Constitution of Illinois, also section 22 of Article 4 of said Constitution, and also section 29 of Article 6 of the Constitution of Illinois; that the said statute is void as against public policy; that the necessary and inevitable effect thereof is to corrupt and degrade the office of Judge of said Circuit Court of Cook County by putting it in the power of said judges to create an unlimited number of such probation officerships with suitable salaries payable out of the funds of Cook County, and distribute them as rewards for services; that the statute is further unconstitutional in that the office of probation officer is in violation of the Bill of Rights, in that said statute purports "to empower such probation officer arbitrarily to take any child in said Cook County from its parents and arbitrarily deprives such child of its liberty, and arbitrarily to keep said child confined and imprisoned for an indefinite time, without said child having been charged with or being guilty of, any crime or offense whatever, and without said child having been tried by a jury of its peers, and without due process of law, and without bail." That it is further against public policy in that its

secret and are not open to the inspection of the public as required by law; that "your errors" are advised and believe that the said necessary provision for the publication of probation officers is unconstitutional and void as construed in Hill v. Cook County Commissioners, 256 Ill. 612; that the power of appointment of all probation officers in said juvenile court is vested solely in the judges of the Circuit Court of Cook County, and that the Board of Commissioners of Cook County have no power whatever in reference thereto.

The foregoing allegations of the bill are contained in paragraphs 1 to 17 thereof. Paragraphs 18 to 23 allege that the statute in question violates section 3 of the Constitution of Illinois, also section 23 of article 4 of said Constitution, and also section 23 of article 6 of the Constitution of Illinois; that the said statute is void as against public policy; that the necessary and inevitable effect thereof is to corrupt and degrade the office of Judge of said Circuit Court of Cook County by putting it in the power of said judges to create an unlimited number of such probation officers with suitable salaries payable out of the funds of Cook County, and distribute them as rewards for services; that the statute is further unconstitutional in that the office of probation officer is in violation of the Bill of Rights, in that said statute purports "to empower such probation officer arbitrarily to take any child in said Cook County from the parents and arbitrarily deprive such child of its liberty, and arbitrarily to keep said child confined and imprisoned for an indefinite time, without said child having been charged with or being guilty of, any crime or offense whatever, and without said child having been tried by a jury of its peers, and without due process of law, and without bail."

That it is further against public policy in that it

necessary effect is to increase the number of cases in which children are torn from the homes of their parents and turned over to strangers or institutions that have no interest whatever in their welfare; that such probation officers being removable whenever they incur the displeasure of the judge work incessantly to drum up fresh cases for said court in order to "hold their jobs" and increase the number of probation officerships that the judge thereof feels justified in asking at the end of each fiscal year.

Complainants are advised and believe there is no warrant of law for the creation by said judges of the Circuit Court of Cook County of the so-called office of "Director Juvenile Psychopathic Institute" and that there is no warrant of law for the payment of salaries appropriated for said officers.

To this bill the defendants on April 18, 1917, filed a plea and demurrer and in their plea set forth that as to paragraphs 18 to 23 inclusive of complainants bill, on and before the commencement of this suit, one of the complainants William H. Dunn, had filed his bill in chancery against Robert M. Sweitzer as County Clerk and ex-officio comptroller of the County of Cook, Peter Bartzen, then president of the Board of Commissioners of the County of Cook and William O'Connell, County Treasurer of the County of Cook and the predecessor in office of Henry Stuckart, County Treasurer of Cook County, charging that the act referred to in complainants' bill was void and unconstitutional for the various reasons now charged and alleged, and praying relief against the defendants in the same manner and for the same matters and to the same effect as complainants now pray by their present bill; that the defendants in said

necessary effect is to increase the number of cases in which children are torn from the homes of their parents and turned over to strangers or institutions that have no interest whatever in their welfare; that such protection officers being removed whenever they incur the displeasure of the judge work incessantly to turn up fresh cases for said court in order to "hold their jobs" and increase the number of protection officerships that the judge thereof feels justified in making at the end of each fiscal year.

Complainants are advised and believe there is no warrant of arrest by the circuit judge of the circuit court of Cook County of the respondent of the "protection officer" and that there is no warrant of arrest of law for the payment of salaries appropriated for said officers.

To this bill the defendants on April 12, 1917, filed a plea and answer and in their plea set forth that as to paragraph 10 to 23 inclusive of complainant's bill, on and before the commencement of this suit, one of the complainants, to wit, John, had filed his bill in equity against Robert M. Swisher as county clerk and ex-officio comptroller of the County of Cook, Peter Warkon, then president of the Board of Commissioners of the County of Cook and William O'Connell, County Treasurer of the County of Cook and the predecessor in office of Henry Lusk, County Treasurer of Cook County, alleging that the act referred to in complainant's bill was void and unconstitutional for the various reasons now charged and alleged, and praying relief against the defendants in the same manner and for the same matters and to the same effect as complainants now pray by their present bill; that the defendants in said

cause had filed a joint and several demurrer to said bill and that a final decree had been entered therein dismissing said bill for want of equity; that an appeal had been allowed complainants to the Supreme Court of Illinois, but that the same had not been perfected and that said decree was a bar, and defendants pleaded same to said paragraphs of the bill of complaint and demanded the judgment of the court whether they should be compelled to make any answer to said paragraphs.

As to the remainder of the bill, the defendants filed a joint general demurrer. The plea was set down for hearing with the demurrer and said plea and demurrer was each sustained and the bill dismissed for want of equity.

Appellants have presented many authorities tending as they think to show that the decree entered in the former suit is not a bar to this action for the reason as it is argued that the demurrer to the first bill was sustained because the bill in that case had been prematurely filed and there was, therefore, no adjudication on the merits such as to bar a new suit.

They also argue (citing authorities) that the former decree does not amount to an adjudication because the parties to these suits are not the same, either as to plaintiffs or defendants. It will be noted the plea was filed only to those certain parts of the bill, in which the Juvenile Court Act is said to be unconstitutional and void.

It is not necessary for us to consider these questions thus raised by appellants for the reason that if it was the desire of appellants to argue these constitutional questions, they have chosen the wrong forum. By appealing to this court appellants waived all questions as to

cause had filed a joint and several answer to said bill and that a final decree had been entered therein dissolving said bill for want of equity; that an appeal had been allowed complainant to the Supreme Court of Illinois, but that the same had not been perfected and that said decree was a bar, and defendant pleaded same to said paragraph of the bill of complaint and demanded the judgment of the court whether they should be compelled to make any answer to said paragraph.

As to the remainder of the bill, the defendant filed a joint general answer. The plea was set down for hearing with the defendant and said plea and answer was each sustained and the bill dismissed for want of equity. Appellants have presented many authorities tending to show that they think that the decree entered in the former suit is not a bar to this action for the reason as it is argued that the defendant to the first bill was not bound because the bill in this case had been previously filed and there was, therefore, no adjudication on the merits such as to bar a new suit.

They also argue (citing authorities) that the former decree does not amount to an adjudication because the parties to those suits are not the same, either as to plaintiff or defendant. It will be noted the plea was filed only to those certain parts of the bill, in which the Supreme Court has said it is incompetent and void.

It is not necessary for me to consider those questions thus raised by appellants for the reason that if it was the desire of appellants to argue these constitutional questions, they have chosen the wrong forum. By appealing to this court appellants waived all questions as to

the constitutionality of the statute. Luken v. L. S. & M. S. Ry. Co., 248 Ill. 377; Sixby v. Chicago City Ry. Co., 260 Ill. 478; P. C., C. & St. L. Ry. Co. v. Chicago, 242 Ill. 178; French v. The Cloverleaf Mining Co., 190 Ill. App. 400.

The only other question, therefore, which it is necessary for us to decide is whether after the plea was sustained, and those parts of the bill to which it was interposed eliminated, the remainder of the bill stated a cause of action. The statute in pursuance to which it is alleged these offices were created, has been construed and held constitutional by the Supreme Court in the case of Witter v. Cook County Comm., 256 Ill. 616. It was there said -

"The Juvenile Court exercises a jurisdiction of the Court of Chancery which is of very ancient origin, and which extends to the care of the persons of infants within the jurisdiction and to their protection and education. This court long ago declared it to be a power, which exists in every well regulated society, to see that infants within the jurisdiction of the court are not abused, defrauded or neglected, and that they shall be reared and educated under such influences as will make them good citizens, and that this power is vested in the Court of Chancery, representing the government. The parental care of the State is administered by the Juvenile Court, and that court performs a purely judicial function in the hearing of causes brought before it. The infant is not brought before the court as a defendant charged with an infraction of the laws, but is brought within the jurisdiction of the court to receive its care and protection. * * * It would be impossible for the court to make personal investigation of each case so as to act intelligently, and it is essential that the court act only upon a thorough investigation of the facts and a consideration of every circumstance that will enable the court to enter a just decree. Accordingly it has been deemed wise to provide by statute for one or more assistants to the court under the name of probation officers."

While in the order which provided for the appointment of these officers one was designated as "Director Juvenile Psychopathic Institute", another "Assistant Director Juvenile Psychopathic Institute" and another as "Assistant to Judge,

Female Probation Officer, a lawyer", etc. we think it clearly appears from the allegations of the bill that these were simply names descriptive of the duties which each probation officer would be expected to fulfill and were adopted into the order of the court from the report of the committee of the judges who had examined into the necessities for the appointment of such officers. It would be strange, indeed, if in a court passing upon such a large number of cases with all the varied circumstances of those coming before it, so strict an interpretation should be put upon the law as to prevent the division of labor among the probation officers appointed which is necessary to secure the best possible results.

If wrongs exist in the administration of this court such as are stated (entirely as conclusions of the pleader) in complainants' bill, the law provides well known and sufficient remedies whereby all such wrongs may be set right, but these are not by way of injunction against the payment of the salaries of the duly constituted officers of the court.

The decree will be affirmed.

AFFIRMED.

Female Probation Officer, a lawyer, etc. we think it clearly appears from the allegations of the bill that those were simply names descriptive of the duties which each probation officer would be expected to fulfill and were added into the order of the court from the report of the committee of the judges who had examined into the necessities for the appointment of such officers. It would be strange, indeed, if in a court passing upon such a large number of cases with all the varied circumstances of those coming before it, no strict interpretation should be put upon the law as to prevent the division of labor among the probation officers appointed which is necessary to secure the best possible results.

If wrongs exist in the administration of this court and as we stated (entirely as conclusions of the grand jury) in complaints, still, the law provides well known and sufficient remedies whereby all such wrongs may be set right, and there are not by way of injunction against the payment of the salaries of the duly constituted officers of the court.

The decree will be affirmed.

APPROVED.

ANDREW P. GUSTAVSON,
Appellee,

vs.

GEORGE C. HESTER,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant below appeals from a judgment for plaintiff entered by the court upon the verdict of a jury.

Plaintiff sued for personal injuries alleged to be the result of negligence of the defendant in the management and control of an automobile driven on a public highway. The declaration also set up an alleged violation by defendant of the statute of the state in regard to speed.

The evidence for plaintiff tended to show plaintiff's automobile was being driven in a southerly direction on a public street known as Sheridan Road by plaintiff's son who was a minor living with the plaintiff and that the plaintiff was riding in the rear seat of the automobile; that the defendant's automobile was being driven by the defendant north on Sheridan Road at a speed of 30 to 35 miles per hour; that while thus driving defendant attempted to pass an electric car in front of him and collided with it, causing him to turn across Sheridan Road toward the west or left hand side, resulting in a collision with the plaintiff's automobile by which plaintiff was severely injured.

The witnesses for the defendant testified that while defendant was driving his automobile north at a speed of about 13 to 14 miles per hour and at about the time he

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EXHIBIT A. 439

307 - 20622

APPEAL FROM
CIRCUIT COURT,
GOOSE COUNTRY.

APPEAL FROM
CIRCUIT COURT,
GOOSE COUNTRY.

MR. JUSTICE HARRIS delivered the opinion of the court.

Defendant below appeals from a judgment for
plaintiff entered by the court in the verdict of a jury.
Plaintiff sued for personal injuries alleged to

be the result of negligence of the defendant in the
management and control of an automobile driven on a public
highway. The declaration also set up an alleged violation
by defendant of the statute of the state in regard to speed.
The evidence for plaintiff tended to show plain-

tiff's automobile was being driven in a southerly direction
on a public street known as Sheridan Road by plaintiff's son
who was a minor living with the plaintiff and that the
plaintiff was riding in the rear seat of the automobile;
that the defendant's automobile was being driven by the

defendant north on Sheridan Road at a speed of 30 to 35
miles per hour; that while both driving defendant attempted
to pass an electric car in front of him and collided with
it, causing him to turn across Sheridan Road toward the west
or left hand side, resulting in a collision with the plain-
tiff's automobile by which plaintiff was severely injured.

The witnesses for the defendant testified that
while defendant was driving his automobile north at a speed
of about 13 to 14 miles per hour and as about the time he

was to have passed the electric car in front of him, the automobile of plaintiff turned across the center of the road in attempting to get around some other automobiles which were also going south, and thus ran into defendant's automobile causing the injury.

This conflicting evidence made a case for the jury under proper instructions as to the law on the respective issues of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff.

Appellant complains of instructions given to the jury at the request of plaintiff, and particularly of instruction No. 3, which informed the jury as to the law of speed applicable to the case as expressed in the words of the statute, and concluding directed "if you believe from a preponderance of the evidence in this case that the defendant drove his car in violation of the law herein set forth and caused the damage and injury to the plaintiff, if you so believe from the evidence the plaintiff was damaged or injured, then you should find the defendant guilty."

It is argued that this instruction was erroneous for the reason that while it directed a verdict for the plaintiff, it wholly took away from the consideration of the jury the question of due care on plaintiff's part.

On the part of the plaintiff it is contended that there is no evidence in the record from which contributory negligence can be inferred for the reason that the plaintiff was not driving the automobile at the time of the accident, and it is urged the negligence of the minor son who was driving cannot be imputed to the plaintiff. In support of this view appellee cites the cases of Bucklerv. City of Newman,

was to have passed the obstacle and in front of him, the
responsibility of plaintiff turned across the center of the
road in attempting to go around the obstacle
which were also going west, and that two more witnesses
attest to the fact.

This conflicting evidence tends to show that the
jury under proper instructions as to the law on the respective
issues of negligence on the part of the defendant, and con-
tributory negligence on the part of the plaintiff.

Defendant complains of instructions given to the
jury at the request of plaintiff, and particularly of in-
struction No. 3, which instructs the jury as to the law of
negligence applicable to the case as expressed in the words of
the statute, and containing directed it to believe from
a preponderance of the evidence in this case that the defendant
drove his car in violation of the law herein set forth and
caused the damage and injury to the plaintiff, if you so
believe from the evidence the plaintiff has presented as referred,
then you shall find the defendant guilty.

It is argued that this instruction was erroneous
for the reason that while it directed a verdict for the
plaintiff, it wholly took away from the consideration of
the jury the question of the defendant's guilt.
On the part of the plaintiff it is contended that
there is no evidence in the record from which contributory
negligence can be inferred for the reason that the plaintiff
was not driving the automobile at the time of the accident,
and it is urged the negligence of the driver was the cause
of the accident and should be imputed to the plaintiff. It is argued in
this view that the case of Lockhart v. City of Kansas, 212 P.2d 1000,

116 Ill. App. 546; Beard of Com. of Boone Co. v. Mutchler,
137 Ind. 140; Johnson v. City of St. Joseph, 96 Mo. A.
663.

We have examined the cases cited by appellee and think they do not sustain the doctrine contended for. These cases seem to hold that the mere relation of parent and child does not of itself render the parent chargeable with the acts of a minor in the driving of a vehicle unless it further appears the minor was at the time under the control and direction of the parent. The opinions, however, expressly state that the question of whether or not the minor is under such control is a question of fact for the jury. Appellee urges us to so hold in this case as a matter of law. The cases cited do not sustain this doctrine.

The contention of appellant might have merit if contributory negligence was a matter of defense only. However, the rule in Illinois (contrary to that which exists in some states) is that due care or lack of contributory negligence is one of the essential things which plaintiff must prove in an action of this kind in order to recover. It, therefore, in the first instance, devolved upon the plaintiff to show by sufficient evidence that at the time he was injured he was in the exercise of due care. Cullen v. Higgins, 216 Ill. 78.

Moreover, plaintiff tried his case upon the theory as alleged in his declaration that the minor was plaintiff's agent and driving in his behalf and we think he cannot here now urge to the contrary.

The instruction is clearly erroneous. It has in many cases been held that it is reversible error to

116 Ill. 407. 246; Board of Com. of Rome Co. v. Haddock
137 Ind. 140; Johnson v. City of St. Joseph, 92 Mo. A.
683.

We have examined the cases cited by appellee and
think they do not sustain the doctrine contended for.

There is no case to hold that the mere relation of parent
and child does not of itself render the parent responsible
with the acts of a minor in the driving of a vehicle unless

it further appears the minor was at the time under the
control and direction of the parent. The opinions, how-
ever, expressly state that the question of whether or not
the minor is under such control is a question of fact for
the jury. Appellee urges us to so hold in this case as a
matter of law. The cases cited do not sustain this doctrine.

The contention of appellant might have merit if
contributory negligence was a matter of defense only.

However, the rule in Illinois (contrary to that which
exists in some states) is that due care or lack of con-
tributory negligence is one of the essential things which
plaintiff must prove in an action of this kind in order
to recover. It, therefore, in the first instance,

devolved upon the plaintiff to show by sufficient evidence
that at the time he was injured he was in the exercise of
due care. Wulien v. Higgins, 216 Ill. 70.

Moreover, plaintiff tried his case upon the
theory he alleged in his declaration that the minor was
plaintiff's agent and driving in his behalf and we think
he cannot now urge to the contrary.

The instruction is clearly erroneous. It has
in many cases been held that it is reversible error to

omit from an instruction which directs a verdict, any essential element which is necessary for the plaintiff to prove in order to recover, and this error is not cured by other instructions correctly informing the jury of the point at issue. Krieger v. A. M. & C. R. R. Co., 242 Ill. 544; Illinois Terra Cotta Co. v. Hanley, 214 Ill. 243; I. C. R. R. Co. v. Smith, 203 Ill. 608; Pardridge v. Cutler, 163 Ill. 504.

Other points have been urged by appellant which we do not deem it necessary to discuss. For the error indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

omit from an instruction which directs a verdict, any essential element which is necessary for the plaintiff to prove in order to recover, and this error is not cured by other instructions correctly informing the jury of the point at issue. Wilder v. A. A. E. L. E. Co., 243 Ill. 244; Illinois Terra Cotta Co. v. Emery, 214 Ill. 245; I. E. L. Co. v. Smith, 203 Ill. 608; Partridge v. Collier, 103 Ill. 504.

Other points have been urged by appellant which we do not deem it necessary to discuss. For the error indicated the judgment must be reversed and the cause remanded.

REVEREND AND HONORABLE.

227 - 23572

ROBERT QUAIT,

Appellee,

vs.

HORACE L. WORTHAM,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

211 I.A. 453

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Quait, brought suit against the defendant upon a written contract and recovered judgment - pursuant to a directed verdict - in the sum of \$1392. This appeal is from that judgment.

In May, 1902, Wortham Bros.' Co., which conducted a merchandising business at Tuscola, moved its business to Rockford, Illinois. The plaintiff, Robert Quait, was and had been a salesman for Carson, Pirie, Scott and Company, for over thirty years. In the interests of his employers he traveled throughout the state of Illinois. He had sold general merchandise for his employers to Wortham Bros.' Co. when that Company conducted its business in Tuscola, and, also, after it moved and established its business at Rockford. The Wortham Bros.' Co. moved from Tuscola to Rockford in May, 1902. On September 9, 1902, the plaintiff and the defendant, Horace L. Wortham, together with William L. Wortham and Jesse L. Wortham - who were made defendants but not served - entered into a written

Ill. A. 453

Robert Gault,

Appellee,

vs.

Horace L. Workman,

Appellant.

ALLIANCE

CIRCUIT COURT,

COOK COUNTY.

MR. KENNEDY, JUSTICE TALKER delivered the

opinion of the court.

The plaintiff, Gault, brought suit against

the defendant upon a written contract and recovered

judgment - pursuant to a directed verdict - in the

sum of \$392. This appeal is from that judgment.

In May, 1902, Workman Bros. Co., which

conducted a merchandising business at Tazewell, moved

its business to Rockford, Illinois. The plaintiff,

Robert Gault, was and had been a salesman for Workman

Bros. Co. and Company, for over thirty years. In

the interests of his employer he traveled through-

out the state of Illinois. He had sold general merchan-

dise for his employer to Workman Bros. Co. when that

Company conducted its business in Tazewell, and, also,

after it moved and established its business at Rockford.

The Workman Bros. Co. moved from Tazewell to Rockford

in May, 1902. On September 9, 1902, the plaintiff

and the defendant, Horace L. Workman, together with

William L. Workman and James L. Workman - who were

made defendants but not served - entered into a written

agreement, the substantial part of which is as follows:

"The said parties of the first part (meaning the Worthams) in consideration that said party of the second part (meaning Quait) purchase thirty (30) shares of the common stock of the Wortham Brothers Company, a corporation duly organized and existing under the laws of the State of Illinois, and having its place of business at Rockford, in Winnebago County, State of Illinois, and in which said company said parties of the first are stockholders, and pays the sum of three thousand dollars (\$3,000) cash for same, hereby agree to pay said Quait the sum of two hundred forty (\$240) dollars annually, payable on the ninth day of September of each year, during the time the same is held by Robert Quait and not otherwise.

And it is hereby agreed by said Quait that he will hold said thirty (30) shares of stock for the period of five years from the date hereof, with the option and privilege to the parties of the first part to purchase said thirty (30) shares of stock from said Quait on their paying him therefor the sum of three thousand dollars (\$3,000) at any time before the expiration of said five years.

And it is agreed that the dividends earned by said stock during the time the same is held by said Quait shall be paid to said parties of the first part, and shall be collected by them from said corporation, and the said Quait hereby authorizes the said parties of the first part to collect the same, and to give receipts and acquittances therefor in his name:

And it is further agreed that during the said period of five years the parties of the first part control the said stock for the purpose of voting the same in person or by proxy at any annual, special, or other meeting of the stockholders, convened for any purpose whatever; and the said Quait does hereby constitute and appoint said parties of the first part, or any or either of them, his attorney or attorneys, or agent, or agents, for him and in his name, place and stead to vote said stock at any such meetings."

Wortham Brothers Co. was capitalized at \$100,000. Pursuant to the terms of the written agreement on September 9, 1902, a certificate for thirty shares - each of the par value of \$100 - of that company's stock, was delivered to the plaintiff and the latter paid therefor the sum of \$3,000.00. There is some question as to where the con-

Accordingly, the substantial part of which is as follows:

"The said parties of the first part (hereinafter referred to as the 'parties') in consideration of the sum of \$100,000 (one hundred thousand dollars) to be paid by the second party (hereinafter referred to as the 'second party') to the first party (hereinafter referred to as the 'first party') in consideration of the sum of \$100,000 (one hundred thousand dollars) to be paid by the first party to the second party, have agreed that the first party shall deliver to the second party, on the first day of September of each year, during the term of years hereinafter expressed, a certain sum of money, to-wit: the sum of \$100,000 (one hundred thousand dollars) in the first year, and the sum of \$100,000 (one hundred thousand dollars) in each of the years thereafter, until the expiration of the term of years hereinafter expressed."

And it is further agreed that the first party shall deliver to the second party, on the first day of September of each year, during the term of years hereinafter expressed, a certain sum of money, to-wit: the sum of \$100,000 (one hundred thousand dollars) in the first year, and the sum of \$100,000 (one hundred thousand dollars) in each of the years thereafter, until the expiration of the term of years hereinafter expressed."

And it is further agreed that the first party shall deliver to the second party, on the first day of September of each year, during the term of years hereinafter expressed, a certain sum of money, to-wit: the sum of \$100,000 (one hundred thousand dollars) in the first year, and the sum of \$100,000 (one hundred thousand dollars) in each of the years thereafter, until the expiration of the term of years hereinafter expressed."

And it is further agreed that the first party shall deliver to the second party, on the first day of September of each year, during the term of years hereinafter expressed, a certain sum of money, to-wit: the sum of \$100,000 (one hundred thousand dollars) in the first year, and the sum of \$100,000 (one hundred thousand dollars) in each of the years thereafter, until the expiration of the term of years hereinafter expressed."

Notwithstanding the fact that the first party has agreed to deliver to the second party, on the first day of September of each year, during the term of years hereinafter expressed, a certain sum of money, to-wit: the sum of \$100,000 (one hundred thousand dollars) in the first year, and the sum of \$100,000 (one hundred thousand dollars) in each of the years thereafter, until the expiration of the term of years hereinafter expressed, the first party has failed to deliver to the second party, on the first day of September of each year, during the term of years hereinafter expressed, a certain sum of money, to-wit: the sum of \$100,000 (one hundred thousand dollars) in the first year, and the sum of \$100,000 (one hundred thousand dollars) in each of the years thereafter, until the expiration of the term of years hereinafter expressed."

tract in question was signed and by whom it was drawn; plaintiff testifying that it was presented to him by Jesse Wortham and signed by him on September 9, 1902, at the office of Carson, Pirie, Scott and Company, in Chicago, when Jesse L. Wortham was present; and the defendant, Horace L. Wortham, testifying that he, himself, signed the contract at Rockford and that the plaintiff, himself, was at Rockford on September 9, 1902. As to the actual drawing up of the contract; the plaintiff says it was presented to him by Jesse Wortham and was already signed by the Worthams; and Horace L. Wortham says it was prepared by the plaintiff's lawyer. The contract itself appears to be typewritten on a letterhead of the Worthams. The evidence shows that payments in the sum of \$240 per year pursuant to the contract had been made to the plaintiff for the years 1903, 1904 and 1905. Claim is now here made for the annual instalments at the rate of \$240 per year for the years 1906, 1907, 1908 and 1909, being the total principal sum of \$960.00, together with interest, which, at the rate of five per cent per annum, make, in toto, \$1392.00.

At the trial, counsel for the defendant undertook to introduce certain evidence in order to show that the written agreement was that the 8 per cent on the \$3,000.00, or \$240.00 a year, was to be paid only during the period of five years from September 9, 1902. Objection being made thereto and being sustained, counsel for the defendant made the following proffer:

test in question was signed and by whom it was drawn; plaintiff testifying that it was presented to him by James Norton and signed by him on September 9, 1903, at the office of Norton, Smith, West and Company, in Chicago, when James L. Norton was present; and the defendant, Herman J. Norton, testifying that he, himself, signed the contract at Rockford on about the plaintiff, himself, was at Rockford on September 9, 1903, as to the actual drawing up of the contract; the plaintiff says it was presented to him by James Norton and was drawn by the defendant; and Herman J. Norton says it was prepared by the plaintiff's lawyer. The contract itself appears to be typewritten on a letterhead of the defendant. The evidence shows that payments in the sum of \$240 per year were made to the defendant had been made to the plaintiff for the years 1903, 1904 and 1905. Claim is now here made for the annual installments at the rate of \$240 per year for the years 1906, 1907, 1908 and 1909, being the total principal sum of \$960.00, together with interest, which at the rate of five per cent per annum, made, in 1910, \$1592.00.

At the trial, counsel for the defendant undertook to introduce certain evidence in order to show that the written agreement was for a term of only six years, or \$1440.00 a year, was to be paid only during the period of five years from September 9, 1903. Counsel for the plaintiff made various objections, counsel for the defendant made the following protest:

"On behalf of the defendant, Horace L. Wortham, counsel offers to prove by the witness now on the witness stand, Horace L. Wortham, that previous to September 9, 1902, the parties to this contract, Robert Quait, on the one hand, and the three Worthams on the other, came to an oral agreement to this effect:- That he, the said Quait, would purchase thirty shares of stock of the Wortham Brothers Company at par or for \$3,000 and pay that sum therefor; that he would give them an option to re-purchase this stock at par for the period of five years; that in consideration of that option, they were to pay him 8 per cent. or \$240 annually during the option period and no more; that during that option period they were to have power to vote the stock and were during that same period to receive all dividends, if any; further, that the said Quait prepared or caused the contract in evidence to be prepared; that after it was prepared, he presented it to the Worthams telling them that it incorporated the previous oral agreement which they had made with reference to the purchase of the stock; that they read it over and that they understood the contract, from his statement and from the reading of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they had the understanding from Quait's statement that the contract obligated them to pay \$240 a year for a maximum of five years only."

The trial judge being of the opinion that the proffered evidence was incompetent, and no further evidence being offered, on motion of the counsel for the plaintiff, directed a verdict for the plaintiff in the sum of \$1392, and entered judgment for that amount. The sole question in the case is whether the parol evidence was competent.

The contract provided, put succinctly, that in consideration of the purchase by the plaintiff of thirty shares for \$3,000.00 - which purchase was made - that the defendants agreed to pay him \$240.00 annually during the time he held the stock "and not otherwise"; that he would hold the stock at the defendants' option for five years, defend-

"On behalf of the defendant, Horace L. Fort-
 had, counsel offers to prove by the witness now
 on the witness stand, Horace L. Fortman, that
 previous to September 9, 1932, the parties to
 this contract, Robert Guilt, on the one hand,
 and the three parties on the other, came to an
 oral agreement to this effect: - That he, the
 said Guilt, would purchase thirty shares of stock
 of the Northern Power Company at par or for
 \$5,000 and pay that sum immediately; that he would
 give them an option to re-purchase this stock at
 par for the period of five years; that in con-
 sideration of that option, they were to pay him
 8 per cent. or \$40 annually during the option
 period and no more; that during that option period
 they were to have power to vote the stock and were
 during that same period to receive all dividends,
 if any; further, that the said Guilt prepared or
 caused the contract in evidence to be prepared;
 that after it was prepared, he presented it to the
 Northern Power Company and it incorporated the pre-
 vious oral agreement which they had made with re-
 ference to the purchase of the stock; that they
 read it over and that they understood the contract,
 from his statement and from the reading of it, to
 mean that what their oral agreement had been; that
 the contract was thereupon executed; that they had
 the understanding from Guilt's statement that the
 contract obligated them to pay \$40 a year for a
 maximum of five years only."

The trial judge being of the opinion that he
 preferred evidence was incompetent, and no further evi-
 dence being offered, on motion of the counsel for the
 plaintiff, directed a verdict for the plaintiff in the
 sum of \$1392, and entered judgment for that amount. The
 sole question in the case is whether the parol evidence
 was competent.

The contract provided, but ambiguously, that in
 consideration of the purchase by the plaintiff of thirty
 shares for \$5,000.00 - which purchase was made - that the
 defendant agreed to pay him \$40.00 annually during the time
 he held the stock "and not otherwise"; that he would hold
 the stock at the defendant's option for five years, defend-

ants to pay \$3,000.00 if they purchased it; that the dividends earned by the stock during the time it should be held by him should be paid to them; and that during the period of five years they should have control of the stock for voting purposes. The option and the voting privilege of the defendants is for five years. The payment of \$240.00 a year, and the payments of dividends to the defendants are to be during the time the stock is held by the plaintiff. Each of these provisions is consistent with all the others. As long as the defendants paid \$240.00 a year, they were to receive the dividends. And, as long as they had the option, they had the voting privilege. There is no ambiguity. The meaning is quite obvious. That the contract may have been improvident does not necessarily render it of doubtful meaning. Did the trial court err in excluding the proffered parol evidence? The defendants offered to prove (1) that "previous" - the time is not otherwise stated - to September 9, 1902, the plaintiff and the defendant entered into an oral agreement that the plaintiff would purchase thirty shares for \$3,000.00; that he would give them an option of purchase for five years; that in consideration of the option they would pay him eight per cent., or \$240.00 annually during the option period only; that during that period they were to have the dividends and the voting power; (2) that the defendants prepared the contract; that he told them that it incorporated the previous oral agreement; that they read it over and they understood the contract, from his statement and from the reading

ants today \$2,000.00 if they purchased it; that the dividends earned by the stock during the time it should be held by him should be paid to them; and that during the period of five years they should have control of the stock for voting purposes. The option and the voting privilege of the defendants is for five years. The payment of \$240.00 a year, and the payments of dividends to the defendants are to be during the time the stock is held by the plaintiff. Each of these provisions is consistent with all the others. As long as the defendants paid \$240.00 a year, they were to receive the dividends. And, as long as they had the option, they had the voting privilege. There is no ambiguity. The meaning is quite obvious. That the contract may have been improvident does not necessarily render it of doubtful meaning. Did the trial court err in excluding the proffered parcel evidence? The defendants offered to prove (1) that "previous" - the time is not otherwise stated - to September 7, 1902, the plaintiff and the defendant entered into an oral agreement that the plaintiff would purchase thirty shares for \$2,000.00; that he would give them an option of purchase for five years; that in consideration of the option they would pay him eight per cent., or \$240.00 annually during the option period only; that during that period they were to have the dividends and the voting power; (2) that the defendants prepared the contract; that he told them that it incorporated the previous oral agreement; that they read it over and they understood the contract, from his statement and from the reading

of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they understood from the plaintiff's statement that the contract bound them to pay \$240.00 a year for "five years only". Is the oral agreement reasonably consistent with the meaning connoted by the written words? If not, then it was inadmissible. The written contract provides for the payment of \$240.00 annually, "during the time" the stock "is held by Robert Quait and not otherwise." The oral agreement, according to the proffer, provides that the \$240.00 a year is to be paid "during the option period and no more", "a maximum of five years only". The words, "during the time the stock is held by Robert Quait and not otherwise" do not connote the same idea as to time as the words "during the option period and no more". The option period of five years has pre-determined mathematical termini; whereas, "during the time the stock is held by Robert Quait" is expressly of uncertain termination. Inasmuch, therefore, as the proffered evidence would change a substantial provision of the written contract, a provision, clearly and explicitly expressed, it was properly excluded. Mr. Justice Farmer, in Chicago Auditorium Ass'n. v. Fine Arts Bldg., 244 Ill. 532, used the following language, "If the language is plain and unambiguous proof aliunde cannot be heard to contradict or vary its meaning or give it a meaning inconsistent with the language used in the instrument."

In the course of the evidence which was offered and excluded, it is recited that the defendant "read it

of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they understood from the plaintiff's statement that the contract bound them to pay \$240.00 a year for "five years only". Is the oral agreement reasonably consistent with the meaning conveyed by the written words? If not, then it was inadmissible. The written contract provided for the payment of \$240.00 annually, "during the time" the stock "is held by Robert Smith and not otherwise." The oral agreement, according to the proffer, provided that the \$240.00 a year is to be paid "during the option period and no more". "a maximum of five years only". The words, "during the time the stock is held by Robert Smith and not otherwise" do not connote the same idea as to time as the words "during the option period and no more". The option period of five years has pre-defer- mined mathematical termini; whereas, "during the time the stock is held by Robert Smith" is expressly of un- certain termination. Inasmuch, therefore, as the proffered evidence would change a substantial provision of the written contract, a provision, clearly and explicitly expressed, it was properly excluded. Mr. Justice Brandeis, in Chicago Auditorium Ass'n. v. City of Chicago, 244 Ill. 532, used the following language, "If the language is plain and unambiguous proof of intent cannot be heard to contradict or vary its meaning or give it a meaning in- consistent with the language used in the instrument."

In the course of the evidence which was offered and excluded, it is stated that the defendant "read it

over (meaning the written contract) and that he understood the contract, from his statement and from the reading of it, to mean just what their parol agreement had been." The position of counsel is somewhat to the effect that the defendant, who admittedly read the contract before he signed it, made a mistake as to its meaning and considered it to mean something which the plaintiff told him it meant. Such a mistake, if made, cannot here be rectified; although it may be the appropriate subject for a different kind of action in another forum. The parol evidence rule, which, in effect, is in the nature of a rule of substantive law, excludes, in such a case as this, both correction and rectification. The defense that he signed the contract of his own volition, but intended something else, is inadmissible. Hansen v. Gavin, 280 Ill. 354. Further, there is no evidence that the defendant was illiterate, or for any other reason incapable of understanding the written terms of the contract. It follows, therefore, that this particular case does not fall within any one of the exceptions to the general parol evidence rule.

There being no error in the record the judgment is affirmed.

AFFIRMED.

over (meaning the written contract) and that he understood the contract. From his statement and from the reading of it, to mean just what their parole agreement had been. The location of counsel is consistent to the effect that the defendant, who admittedly read the contract before he signed it, made a mistake as to its meaning and considered it to mean something which the plaintiff told him it meant. Such a mistake, if made, cannot have been rectified; although it may be the appropriate subject for a different kind of action in another forum. The parole evidence rule, which, in effect, is in the nature of a rule of substantive law, excludes in such a case as this, both correction and rectification. The defendant that he signed the contract of his own volition, but intended something else, is inadmissible. Y. C. v. Y. C., 230 Ill. 524. Further, there is no evidence that the defendant was illiterate, or for any other reason incapable of understanding the written terms of the contract. It follows, therefore, that this particular case does not fall within any one of the exceptions to the general parole evidence rule.

There being no error in the record the judgment is affirmed.

AFFIRMED.

473 - 23818

GEORGE W. PLUMMER,

Appellee,

vs.

EDWARD J. ADER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 461

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

In the trial court, without a jury, the plaintiff, George W. Plummer, having brought suit for certain legal services, recovered a judgment against the defendant in the sum of \$200. From that judgment this appeal is taken.

In the latter part of 1911 an information for disbarment was filed against the defendant. According to the testimony of the plaintiff certain legal services were rendered by him in the course of the disbarment proceedings. His evidence is to the effect that he appeared before the Master in Chancery before whom testimony was taken, filed objections to the report of the Master, participated in the preparation of a brief for the Supreme Court and conferred with another attorney in preparation for an argument to be made by the latter in the Supreme Court. The plaintiff claims that his legal services in those proceedings were worth, altogether, from \$800.00 to \$1,000.00. The ad damnum in the statement of claim is \$200.00. The witness, John L. Fogle, corroborates the plaintiff to the effect that the latter appeared before the Bar Association grievance committee at least twice; that the plaintiff represented the defendant after the information was filed;

473 - 43818

GEORGE W. TAYLOR

Witness

WITNESS

WITNESS

ON BEHALF

73

GEORGE W. TAYLOR

Witness

211 I.A. 461

THE WITNESSING JUSTICE TAYLOR delivered the

opinion of the court.

In the trial court, without a jury, the plaintiff, George W. Taylor, having brought suit for certain legal services, recovered a judgment against the defendant in the sum of \$200. From that judgment this appeal is taken.

In the latter part of 1911 an information for disbarment was filed against the defendant. According to the testimony of the plaintiff certain legal services were rendered by him in the course of the disbarment proceedings. His witness is to the effect that he appeared before the master in Chancery before whom testimony was taken, filed objections to the report of the master, participated in the preparation of a brief for the Supreme Court and conferred with another attorney in preparation for an argument to be made by the latter in the Supreme Court. The plaintiff claims that the legal services in these proceedings were worth, altogether, from \$200.00 to \$1,000.00. The defendant in the statement of claim is \$200.00. The witness, John L. Taylor, corroborates the plaintiff to the effect that the latter appeared before the bar association committee constituted at least twice; that the plaintiff represented the defendant after the information was filed;

that plaintiff was the active attorney in the matter until it was submitted on oral argument in the Supreme Court in June, 1913, that the plaintiff appeared before the Master more than ten times, and possibly thirty times; that a usual, reasonable and customary fee for the services rendered by the plaintiff would be \$1000.00. On the other hand the defendant testified that the plaintiff stated that he would do the work before the Bar Association for nothing; that he never asked for any compensation on account of legal services in that matter; that he, the defendant, never retained the plaintiff to take part in the proceedings in the Supreme Court. He admits, however, that the plaintiff was present at the taking of testimony. There is evidence concerning other cases that the plaintiff took part in through employment by the defendant, and, also, of payments made by the defendant to the plaintiff. Other witnesses testified, and one Ehrlich, to the effect that the plaintiff, on one occasion intimated that if he could do anything for the defendant he would be glad to do it without compensation.

The determination of the facts depended upon the question of credibility; and, as there was ample evidence in support of the plaintiff's claim, we are not justified in overruling the judgment of the trial judge. Complaint is made on the ground that the claim was outlawed; but, as the evidence shows that the plaintiff worked for, or rendered services for the defendant continuously, at least for quite a period of years, and as part of the legal services in the disbarment proceedings

that plaintiff was the active attorney in the matter until it was admitted on oral argument in the Supreme Court in June, 1913, that the plaintiff appeared before the Master more than ten times, and possibly fifteen times; that a usual, reasonable and customary fee for the services rendered by the plaintiff would be \$1000.00. On the other hand the defendant testified that the plaintiff stated that he would do the work before the Bar Association for nothing; that he never asked for any compensation on account of legal services in that matter; that he, the defendant, never retained the plaintiff to take part in the proceedings in the Supreme Court. He admits, however, that the plaintiff was present at the taking of testimony. There is evidence concerning other cases that the plaintiff took part in through employment by the defendant, and, also, of payments made by the defendant to the plaintiff. Other witnesses testified, and one testified, to the effect that the plaintiff, on one occasion intimated that if he could do anything for the defendant he would be glad to do it without compensation. The determination of the facts depended upon the question of credibility; and, as there was easily evidence in support of the plaintiff's claim, we are justified in overturning the judgment of the trial judge. Complaint is made on the ground that the claim was introduced; but, as the evidence shows that the plaintiff worked for, or rendered services for the defendant continuously, at least for quite a period of years, and as part of the legal services in the defendant proceedings

was rendered within the statutory period, that claim is unfounded. Complaint is also made that the trial court erred in not allowing a change of venue; but, obviously that is untenable. Of course, the final contention, that the plaintiff did not sue for as much as the evidence shows he was entitled to, that is from \$800.00 to \$1000.00, instead of \$200.00, is without merit. Generosity is not an offense. He who sues for less than that to which he is entitled and foregoes the residue is to be commended, not condemned.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

was rendered within the statutory period, that claim is
unfounded. Complaint is also made that the trial court
erred in not allowing a change of venue; but, obviously
that is untenable. Of course, the final contention, that
the plaintiff did not sue for as much as the evidence
shows he was entitled to, that is from \$800.00 to \$1000.00,
instead of \$200.00, is without merit. Generally it is not
an offense. He was sued for less than that to which he
is entitled and foregoes the residue to be considered,
not condemned.

Finding no error in the record the judgment

is affirmed.

APPROVED.

561 - 23906

DR. WM. J. MOLDENHAUER,

Appellee,

vs.

JOSEPH MOSKALCZUK,

Appellant.)

211 I.A. 462

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Dr. Wm. J. Moldenhauer, brought suit against the defendant for the sum of \$75, for medical services and recovered judgment in that amount. This appeal is taken therefrom.

The statement of facts shows that plaintiff, a physician and surgeon, was called, on August 8, 1913, to attend the defendant who had been injured; that in the course of the following three weeks, plaintiff called on the defendant at his home fifteen times; that within the same period of time the defendant called at the office of the plaintiff twelve times and that subsequently thereto the defendant called at the office of the plaintiff nineteen times, making, in all, a total of thirty-one office calls; that the plaintiff had been called in court to testify in a case in which the defendant was the plaintiff; that for all the services rendered by the plaintiff to the defendant he charged the sum of \$75, as a fair, reasonable, usual and customary charge for the services

2111 A. 162

DR. W. J. NEEDHAM, JR.
 Appellee.
 vs.
 JOSEPH KOSKALCZUK.
 Appellant.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Dr. W. J. Needham, Jr., brought suit against the defendant for the sum of \$75, for medical services and recovered judgment in that amount. This appeal is taken therefrom.

The statement of facts shows that plaintiff, a physician and surgeon, was called, on August 8, 1913, to attend the defendant who had been injured; that in the course of the following three weeks, plaintiff called on the defendant at his home fifteen times; that within the same period of time the defendant called at the office of the plaintiff twelve times and that subsequently thereafter the defendant called at the office of the plaintiff nineteen times, making, in all, a total of thirty-one office calls; that the plaintiff had been called in court to testify in a case in which the defendant was the plaintiff; that for all the services rendered by the plaintiff to the defendant he charged the sum of \$75, as a fair, reasonable, usual and customary charge for the services

performed. The statement of facts further shows that on cross examination plaintiff stated that he had been treating the defendant for bruises about the head, and, also, for headache; that he considered the number of calls that he made was necessary and that, generally, when he called on the defendant, or the defendant called at his office, he gave him some medicine; that for the first call he made at the defendant's house he charged him \$5.00; that for subsequent calls at the house he charged the defendant at the rate of \$1.50 a call, and for office calls 75 cents to \$1.00; that for his appearance in court he charged the defendant \$25.00. The statement of facts further shows that when the defendant asked the witness, "Is it not a fact that you charged 50 cents for each office call?", the question was objected to by counsel for the plaintiff and the objection sustained by the court, and an exception to the ruling thereon taken by the defendant.

The defendant introduced no evidence but made various motions at the close of the plaintiff's evidence, all of which motions were overruled. The trial judge then found the issues in favor of the plaintiff and assessed the plaintiff's damages in the sum of \$75.00 upon which judgment was duly entered.

It is now claimed by the appellant (1) that the statement of claim did not state a cause of action; (2) that the plaintiff, a physician, was not entitled to extra compensation as an expert testifying in the former suit in the absence of a special agreement.

performed. The statement of facts further shows that on cross examination plaintiff stated that he had been treating the defendant for warts about the head, and, also, for headaches; that he considered the number of calls that he made was necessary and just, generally, when he called on the defendant, or the defendant called at his office, he gave him some medicine; that for the first call he made at the defendant's house he charged him \$5.00; that for subsequent calls at the house he charged the defendant at the rate of \$1.00 a call, and for office calls 75 cents to \$1.00; that for his appearance in court he charged the defendant \$25.00. The statement of facts further shows that when the defendant asked the witness, "is it not a fact that you charged 50 cents for each office call?", the question was objected to by counsel for the plaintiff and the objection sustained by the court, and an exception to the ruling thereon taken by the defendant.

The defendant introduced no evidence but made various motions at the close of the plaintiff's evidence, all of which motions were overruled. The trial judge then found and entered in favor of the plaintiff and assessed the plaintiff's damages in the sum of \$75.00 upon which judgment was duly entered.

It is now claimed by the appellant (1) that the statement of facts did not state a cause of action; (2) that the plaintiff, a physician, was not entitled to extra compensation as an expert testifying in the former suit in the absence of a special agreement.

(1) The statement of claim is as follows:

"Plaintiff alleges his claim is for medical services rendered during the years 1913, 1914, 1915 and 1916, amounting to the sum of \$75.00." The affidavit attached to the plaintiff's statement of claim recites "that the said cause is on a contract for the payment of money; that the nature of plaintiff's demand is as stated and that there is due the plaintiff from the defendant, after allowing for the defendant all his just credits, deductions and set-offs, the sum of \$75.00." Section 40 of the Municipal Court Act merely requires "a statement of the plaintiff's claim, which statement, if the suit be upon a contract, express or implied, shall consist of a statement of the account or of the nature of the demand," etc. We are of the opinion that, as the statement of claim recited that it was for medical services and recited that those services were rendered in certain specified years, and that the amount of the claim was \$75.00, it was sufficient. And, although the evidence recited in the statement of facts in the record is apparently somewhat condensed and abbreviated, and does not give the questions and answers which occurred at the trial, a careful examination thereof leads us to the conclusion that it justified the judgment. (2) Part of the statement of facts is to the effect that the plaintiff had rendered certain services to the defendant in testifying in some case in which the defendant was the plaintiff, and for those services made a charge of \$25.00. There is no evidence in the record of any cross examination on that subject, or of anything in rebuttal, and, under those circumstances, we are unable to say that the court erred in allowing plaintiff's claim for those services.

(1) The statement of claim is as follows:

"Plaintiff alleges his claim is for medical services rendered during the years 1912, 1913, 1914, 1915 and 1916, amounting to the sum of \$75.00." The affidavit attached to the plaintiff's statement of claim recites "that the nature is in a contract for the payment of money; that the nature of plaintiff's demand is an agreed sum that there is due the plaintiff from the defendant, after allowing for the defendant all his just credits, deductions and set-offs, the sum of \$75.00." Section 46 of the Municipal Court Act merely requires "a statement of the plaintiff's claim, which statement, if the suit be upon a contract, express or implied, shall consist of a statement of the amount or of the nature of the demand," etc. We are of the opinion that, as the statement of claim recites that it was for medical services and recited that those services were rendered in certain specified years, and that the amount of the claim was \$75.00, it was sufficient. And, although the claim was recited in the statement of facts in the record as apparently incorrectly condensed and abbreviated, and does not give the questions and answers which occurred at the trial, a careful examination thereof leads us to the conclusion that it justified the judgment. (2) Part of the statement of facts is to the effect that the plaintiff had rendered certain services to the defendant in testing in some case in which the defendant was the plaintiff, and for these services made a charge of \$25.00. There is no evidence in the record of any cross examination on that subject, or of anything in rebuttal, and, under those circumstances, we are unable to say that the court erred in allowing plaintiff's claim for these services.

As to the claim of the defendant, that the court erred in sustaining an objection to the question, "Is it not a fact that you charged 50 cents for each office call?", the record of what transpired before the trial judge is too incomplete to justify its consideration.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

As to the claim of the defendant, that the
court acted in sustaining an objection to the question,
"is it not a fact that you bought the car from
the defendant?" the record is not sufficient to show
the trial judge is too incompetent to justify the
objection.

Finding no error in the record and judgment
is affirmed.

REVEREND

402 - 23747

J. ELLIOT AINSLIE,

Appellee,

vs.

JOSEPH H. BIGGS,

Appellant.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

211 I.A. 463

MR. JUSTICE O'CONNOR delivered the opinion of the court.

J. Elliot Ainslie brought suit against Joseph H. Biggs to recover for personal injuries. There was a verdict and judgment in favor of plaintiff for \$1,200 to reverse which defendant prosecutes this appeal.

The record discloses that about six o'clock in the evening of February 4, 1915, plaintiff was walking east along the north sidewalk of Leland avenue, between Kenmore avenue and Sheridan Road, Chicago. Between these two streets there is an alley about sixteen feet wide, which extends north and south and opens upon Leland avenue. The evening in question was rainy, cold and dark. As plaintiff came opposite the opening of the alley, a one and half ton auto-truck was coming out of the alley. Plaintiff tried to step back to avoid being injured, slipped and fell, and the right front wheel of the truck passed over his leg, fracturing the fibula about midway between the knee and ankle. The truck was brought to a stop before the hind wheel passed over plaintiff's leg.

211 A. 463

THE JUSTICE OF THE PEACE delivered the opinion of

the court.

J. Elliot Ainslie brought suit against Joseph
E. Higgins for recovery for personal injuries. There was a
verdict and judgment in favor of plaintiff for \$1,200
to reverse which defendant prosecutes this appeal.

The record discloses that about six o'clock
in the evening of February 4, 1913, plaintiff was walk-
ing east along the north sidewalk of Belmont Avenue, be-
tween Kenmore Avenue and Sheridan Road, Chicago. Be-
tween these two streets there is an alley about sixteen
feet wide, which extends north and south and opens upon
Belmont Avenue. The evening in question was rainy, cold
and dark. As plaintiff came opposite the opening of the
alley, a one and half ton auto-truck was coming out of
the alley. Plaintiff tried to step back to avoid being
injured, slipped and fell, and the right front wheel of
the truck passed over his leg, fracturing the tibia
about midway between the knee and ankle. The truck was
brought to a stop before the hind wheel passed over
plaintiff's leg.

The defendant first contends that there is a fatal variance between the allegations of the declaration and the evidence, in that it was averred in the declaration that "said auto truck then and there ran and struck with great force and violence upon and against the plaintiff and thereby the plaintiff was then and there thrown with great force and violence to and upon the ground", while the proof showed that the plaintiff was not thrown to the ground, but on the contrary that he in an endeavor to get out of the way slipped and fell and the wheel passed over his leg.

In support of this contention the cases of Chicago Union Traction Co. v. Hampe, 228 Ill. 346, and Christensen v. Oscar Daniels Co., 142 Ill. App. 129, are cited. In the Hampe case the averment of the declaration was that the "car struck with great force and violence against the wagon, whereby plaintiff was thrown with great force and violence upon the ground," while the evidence showed that there was about to be a collision between the street car on which plaintiff was a passenger and a wagon some distance ahead on the track, and when the car was at least thirty or thirty-five feet from the wagon, plaintiff stepped off or was pushed from the car, and it was held that this variance was fatal. In the Christensen case it was held that the allegation that plaintiff "tripped upon the said cable and threw his hand back against the said drum," was not sustained by proof that he "was tripped by the lower drum, that is the one behind me," etc., and that this constituted a fatal variance.

The defendant first contended that there is a fatal variance between the allegations of the declaration and the evidence, in that it was averred in the declaration that "said auto struck them and there ran and attack with great force and violence upon and against the plaintiff and thereby the plaintiff was then and there thrown with great force and violence to and upon the ground", while the proof showed that the plaintiff was not thrown to the ground, but on the contrary that he in an endeavor to get out of the way slipped and fell and the wheel passed over his leg.

In support of this contention the cases of Chicago Union Traction Co. v. Payne, 232 Ill. 346, and Christensen v. Great Northern Ry., 142 Ill. App. 122, are cited. In the latter case the averment of the declaration was that the "car struck with great force and violence against the wagon, whereby plaintiff was thrown with great force and violence upon the ground," while the evidence showed that there was doubt as to a collision between the street car on which plaintiff was a passenger and a wagon some distance ahead on the track, and when the car was at least thirty or thirty-five feet from the wagon plaintiff stepped off or was pushed from the car, and it was held that this variance was fatal. In the Christensen case it was held that the allegation that plaintiff "tripped upon the said cable and threw his hand back against the said drum," was not sustained by proof that he "was tripped by the lower drum, that is the one behind me," etc., and that this constituted a fatal variance.

We think the variance in these two cases was greater than in the case at bar, and are of the opinion that here the variance is not of substantial character. Moreover, we think the point was not properly saved. When plaintiff's evidence was being introduced that tended to show the variance complained of, no objection was made, but at the close of plaintiff's case counsel for defendant stated he wanted to make a motion, "on the ground that they have not proved what is alleged in their declaration. They say the automobile truck knocked him down to the ground whereas the witnesses don't testify to that. There is a variance between the proof and the declaration. I make a motion to dismiss because they have not proved what they have alleged." Defendant thereupon submitted a written motion together with an instruction that the jury return a verdict of not guilty. From this it appears that it was not pointed out at any time in what respect the proof failed to meet the allegations. In L. S. & M. S. Ry. Co. v. Ward, 135 Ill. 511, the court said (516): "At the close of the evidence the defendant's counsel asked the court to instruct the jury to find a verdict for the defendant on the ground that there was no negligence on the part of the defendant; that the accident occurred through the negligence of the plaintiff, 'and that the proof varies from the declaration.' This was the only attempt to point out a variance, and it was clearly insufficient. It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently and also to enable the plaintiff to so amend her pleading

To think the variance in these two cases was greater than in the case at bar, was one of the opinions that bore the variance is not of substantial importance.

Moreover, we think the point was not properly saved.

When plaintiff's evidence was being introduced that tended to show the variance complained of, no objection

was made, but at the close of plaintiff's case counsel for defendant stated he wanted to make a motion, "on the ground that they have not proved what is alleged in their declaration. They say the automobile truck knocked him

down to the ground between the witness can't testify to that. There is a variance between the proof and the declaration. I make a motion to dismiss because they have not proved what they have alleged." Defendant thereupon

submitted a written motion together with an instruction that the jury return a verdict of not guilty. From this it appears that it was not pointed out at any time in what

respect the proof failed to meet the allegations. In I. R. v. R. R. Co., 135 Ill. 511, the court said (515): "At the close of the evidence the defendant's

counsel asked the court to instruct the jury to find a verdict for the defendant on the ground that there was no negligence on the part of the defendant; that the negligence occurred through the negligence of the plaintiff, and that the proof varied from the declaration." This was the only attempt to point out a variance, and it was clearly

insufficient. It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently and also to enable the plaintiff to so amend her pleading

as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim." To the same effect are Murchie v. Peck Bros. & Co., 160 Ill. 175; Probst Construction Co. v. Foley, 166 Ill. 31, and City of Chicago v. Weiland, 139 Ill. App. 197. In the latter case it was said an objection on the ground of variance must be specifically pointed out on the trial at the time the variance is made apparent by the proofs and the court's attention directed to it; that the object of this was to prevent a mistrial on a legal technicality in no wise affecting plaintiff's case, and that the plaintiff might be afforded an opportunity of avoiding the variance by appropriate amendment to his declaration. It was there said: "The trend of the law is to discourage technicalities which tend to defeat natural justice and right, and to encourage the adjudication of causes on their merits."

In the instant case, we think the objection on the ground of variance was not sufficiently specific. Furthermore, at the close of all the evidence, the defendant again moved for an instructed verdict, but at that time made no point that there was a variance. Where a motion is made for an instructed verdict at the close of plaintiff's case and is overruled, if the defendant fails to renew the motion at the close of all the evidence, the ruling of the court cannot be urged as error on appeal. J.A. & N. Ry. Co. v. Velie, 140 Ill. 59; Wolf Co. v. Refrigerating Co., 252 Ill. 491. At the close of all the evidence the defendant moved for a directed verdict, but as he failed

as to make it conform to the evidence, and thus avoid
defect upon a point in no way involving the merits of
her claim." To the same effect are Wynne v. Bush
180 Ill. 175; Proctor v. Proctor, 180 Ill. 175;
180 Ill. 175; Proctor v. Proctor, 180 Ill. 175;
180 Ill. 175; Proctor v. Proctor, 180 Ill. 175;
111. App. 197. In the latter case it was said an objec-
tion on the ground of variance must be specifically
pointed out on the trial at the time the variance is
made apparent by the proofs and the court's attention
directed to it; that the object of this was to prevent
a mistrial on a legal technicality in no wise affecting
plaintiff's case, and that the plaintiff might be afford-
ed an opportunity of avoiding the variance by appropriate
amendment to his declaration. It was there said: "The
trend of the law is to discourage technicalities which
tend to defeat natural justice and right, and to encour-
age the adjudication of causes on their merits."

In the instant case, we think the objection on
the ground of variance was not sufficiently specific.
Furthermore, at the close of all the evidence, the de-
fendant again moved for an instructed verdict, but at
that time made no point that there was a variance. When
a motion is made for an instructed verdict at the close of
plaintiff's case and is overruled, if the defendant fails
to renew the motion at the close of all the evidence, the
ruling of the court cannot be writen as error on appeal.
180 Ill. 175; 180 Ill. 175; 180 Ill. 175; 180 Ill. 175;
180 Ill. 175; 180 Ill. 175; 180 Ill. 175; 180 Ill. 175;
At the close of all the evidence
the defendant moved for a directed verdict, but as he failed

to mention that the motion was made on the ground of a variance, the point is not before us.

Complaint is made of instruction 3 given on behalf of the plaintiff, which told the jury, among other things, that they might take into consideration the rate of speed the truck was being driven, at and prior to the time of the injury. It is said that there is no allegation that plaintiff was injured in consequence of the rate of speed at which the truck was travelling. It is true that there is no specific charge that the truck was being operated at a dangerous rate of speed. The charge is a general charge of negligence in the operation of the truck. We think it was sufficient to warrant the giving of the instruction, as the evidence tended to show that there were no lights on the truck and no warning was given as it came out of the alley, and while the evidence did not show that it was being driven at a reckless rate of speed, we think under the circumstances the question of speed was one of the elements properly submitted to the jury.

Complaint is made of instructions 6 and 10. Instruction 6 is said to be wrong in that it told the jury they might use their observation and experience in business affairs in estimating the damages, and did not confine the jury to the evidence in the case; and instruction 10 is said to be erroneous in that the jury were told that in estimating plaintiff's damages they might take into consideration mental suffering, resulting from

to mention that the action was made on the ground of a variance, the point is not before me.

Complaint is made of instruction 3 given on

behalf of the plaintiff, which told the jury, among other things, that they must take into consideration the rate of speed the truck was being driven, not only prior to the time of the injury. It is said that there is no allegation that plaintiff was injured in consequence of the rate of speed at which the truck was traveling. It is true that there is no specific charge that the truck was being operated at a dangerous rate of speed. The charge is a general charge of negligence in the operation of the truck. We think it was sufficient to warrant the giving of the instruction, as the evidence tended to show that there were no lights on the truck and no warning was given as it came out of the alley, and while the evidence did not show that it was being driven at a reckless rate of speed, we think under the circumstances the question of speed was one of the elements properly submitted to the jury.

Complaint is made of instruction 4 and 10.

Instruction 4 is said to be wrong in that it told the jury they might act on their observation and experience in business affairs in estimating the damages, and did not require the jury to the evidence in the case; and instruction 10 is said to be erroneous in that the jury were told that in estimating plaintiff's damages they might take into consideration mental suffering, resulting from

the injury, while the declaration contained no averment in this regard; that it authorized the jury to take into consideration future pain and suffering in estimating the damages, when there was no evidence to warrant this, and permitted the jury to speculate on the question of damages, as it did not confine them to the necessary, direct and proximate consequences of the injury.

We think the objection to instruction 6 is not well taken, for it told the jury in applying their experience and observation in the business affairs of life that this should be considered in connection with the evidence in the case.

There is no express allegation in the declaration as to mental suffering, but we do not think instruction 10 was misleading. There was evidence that tended to show that the injury was permanent and that plaintiff would suffer in the future. We are therefore of the opinion that the other objections urged to this instruction cannot be sustained.

Moreover, no complaint is made that the verdict is excessive, and even if these instructions on the question of damages were not accurate, yet the objections made to them, even if sustained, could only affect the amount of the verdict, and as no complaint is made in this regard, it is apparent that the defendant was in no way injured.

It is urged that instruction 7 is erroneous, for the reason that the word "accident" mentioned in it was not defined, and therefore it was misleading. We will

the injury, while the declaration contained no averment in this regard; that it instructed the jury to take into consideration future pain and suffering in estimating the damages, when there was no evidence to support this, and permitted the jury to speculate on the question of damages, as it did not confine them to the necessary direct and proximate consequences of the injury.

We think the objection to instruction 6 is not well taken, for it told the jury in applying their experience and observation in the business affairs of life that this should be considered in connection with the evidence in the case.

There is no express allegation in the declaration that no mental suffering, but we do not think instruction 10 was misleading. There was evidence that tended to show that the injury was permanent and that plaintiff would suffer in the future. We are therefore of the opinion that the other objections urged to this instruction cannot be maintained.

Moreover, no complaint is made that the verdict is excessive, and even if these instructions on the question of damages were not accurate, yet the objections made to them, even if sustained, could only affect the amount of the verdict, and no complaint is made in this regard. It is apparent that the defendant was in no way injured.

It is urged that instruction 7 is erroneous, for the reason that the word "accident" mentioned in it was not defined, and therefore it was misleading. We will

presume that the jurors were well informed and understood the English language as required by section 2, chapter 78, R. S., and we therefore have no doubt that the instruction in this regard was perfectly clear. We have considered the other objections urged to this instruction, but think they are without substantial merit.

Upon a consideration of all the instructions we are of the opinion that, considering the fact that the case was simple and easily understood, there was no substantial error in any of the points complained of.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

persons that the jurors were well informed and understood the English language as required by section 2, chapter 78, H. S., and no errors have no doubt that the instruction in this regard was perfectly clear. We have considered the other objections urged to this instruction, but think they are without substantial merit.

Upon a consideration of all the instructions we are of the opinion that, considering the fact that the case was simple and easily understood, there was no substantial error in any of the points complained of.

The judgment of the Circuit Court of Cook

County is affirmed.

ALFRED.

476 - 23821

P. R. McLEOD, doing business as
McLEOD & COMPANY,

Appellant.

vs.

ALEXANDER J. ALEXANDER and LUCAS
BRODHEAD, Trustees of the Estate
of ALEXANDER J. ALEXANDER, and
ASHLAND BLOCK ASSOCIATION, a cor-
poration.

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 485

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

P. R. McLeod, doing business as McLeod & Company,
brought suit against the defendants to recover \$600 claimed
to be due plaintiff for the purchase price of four valves.
The case was tried before the court without a jury; there
was a finding and judgment in favor of the defendants, to
reverse which plaintiff prosecutes this appeal.

The evidence tends to show that plaintiff called
on a representative of the defendants for the purpose of
selling balance piston valves to be used in the operation
of the pumps in the Ashland block; that he represented
that if these valves were installed in lieu of the ones
then in use, there would be developed from ten to thirty
per cent more power, or if no more power was needed, there
would be a saving of from ten to thirty per cent in fuel;
that after some negotiations it was agreed that plaintiff
should install the valves on one of the pumps, and if they

495 - 23021

V. M. KILGUS, doing business as
KILGUS & COMPANY,

Appellant,

vs.

INDUSTRIAL TRUST

OF CHICAGO.

ALFRED L. KILGUS and others,
Attorneys, for the Appellant,
vs.
ALFRED L. KILGUS and others,
Attorneys, for the Industrial Trust
of Chicago.

495 - 23021

BY VICTOR C. GORDON delivered the opinion of

the court.

V. M. KILGUS, doing business as KILGUS & COMPANY,

plaintiff against the defendants to recover \$2000 claimed
to be due plaintiff for the purchase price of four valves.
The case was tried before the court without a jury; there
was a finding and judgment in favor of the defendants, to
reverse which plaintiff presented this appeal.

The evidence tends to show that plaintiff called

on a representative of the defendants for the purpose of
selling valves which plaintiff alleged to be used in the operation
of the pump in the Ashland block; that he represented
that if these valves were installed in line of the pump
that in use, there would be developed from ten to thirty
per cent more power, or if no more power was needed, there
would be a saving of from ten to thirty per cent in fuel;
that after some discussion it was agreed that plaintiff
should install two valves on one of the pumps, and if they

made the saving as represented, defendants would buy them for \$600; that at the time of the agreement plaintiff submitted a printed form of contract which defendant refused to sign, stating that if the valves worked as represented no written agreement was necessary. Plaintiff installed valves on one of the pumps where they remained for approximately one year.

Plaintiff contends that the agreement was that the valves were to be tested by defendants within a reasonable time after installation, that defendants failed to make the test, and under these circumstances plaintiff was entitled to recover the purchase price of the valves, they having been in the possession of defendants for more than a reasonable time in which to make the test. He further contends that he was entitled to recover on an account stated; that after the installation of the valves, and approximately for the twelve months following, he sent statements of the account to defendants each month, and no objection was made thereto until about a year afterwards, when payment was refused and the valves disconnected.

Defendants contend that the agreement was that plaintiff should install the valves on his own responsibility, and if they made the saving of fuel as warranted, and when this was shown, then the question of purchasing them would be taken up; that under these circumstances there could be no account stated. Defendants further contend that in June, 1918, they made a test of the valves for about ten days, and that there was no saving in the consumption of fuel as warranted.

made the saving as represented, defendant would pay them for \$800; that at the time of the agreement plaintiff submitted a printed form of contract which defendant refused to sign, stating that if the valves worked as represented no written agreement was necessary. Plaintiff installed valves on one of the pumps where they remained for approximately one year.

Plaintiff contends that the agreement was that the valves were to be tested by defendant within a reasonable time after installation, that defendant failed to make the test, and under these circumstances plaintiff was entitled to recover the purchase price of the valves, they having been in the possession of defendant for more than a reasonable time in which to make the test. He further contends that he was entitled to recover on an account stated; that after the installation of the valves, and approximately for the twelve months following, he sent statements of the account to defendant each month, and no objection was made thereto until about a year afterwards, when payment was refused and the valves disconnected.

Defendant contends that the agreement was that plaintiff should install the valves at his own responsibility, and if they made the saving of fuel as represented, and when this was shown, then the question of purchasing them would be taken up; that under these circumstances there would be no account stated. Defendant further contends that in June, 1912, they made a test of the valves for about ten days, and that there was no saving in the consumption of fuel as represented.

Of course if the valves were not purchased by the defendants the mere fact of sending statements each month would not make an account stated. Plaintiff offered evidence that tended to show that other valves installed by him in somewhat similar circumstances made the saving in the consumption of fuel as warranted. The court evidently accepted defendants' theory, and as the evidence was conflicting, we cannot say upon a careful examination of the record that the finding of the court is manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Approved To Print: [Signature] Date: [Date]

2000

156 - 23499

ALBERT PICK & COMPANY
and SILAS J. WHITLOCK,
trustees in bankruptcy of
the Estate of NATALBY'S etc..

Appellants,

vs.

CHARLES D. NATALBY et al.

Appellees.

211 I.A. 486

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of
the court.

The original bill in this case was filed by
Albert Pick & Company, a corporation, July 19, 1915,
in which the complainant alleged that it had recovered
a judgment for \$765.00 and costs on Feb. 18, 1915,
against Albert D. Natalby and Charles D. Natalby, co-
partners, as Natalby Brothers; that an execution was
issued thereon and returned by the sheriff in no part
satisfied; that the defendants for some years prior
to the judgment, had conducted a restaurant and saloon,
and that in the conduct of the business various per-
sons had become indebted to them; that they had cer-
tain real and personal property which could not be
reached at law, but which ought to be applied to the
payment of the said judgment; that the defendants organ-
ized a corporation, the certificate of incorporation being
recorded in Cook County June 20, 1914; that they subscrib-
ed for practically all of the stock and to pay for the
same, had conveyed the personal property which had con-

2111A.486

ALBERT PICK & COMPANY,
and alias T. WILSON,
trustee in bankruptcy of
the estate of KATALY, etc.,

APPELLANT,

Appellee.

THE CIRCUIT COURT,
GOOD COUNTY.

vs.

CHARLES D. KATALLY et al.,

Appellee.

MR. JUSTICE THOMSON delivered the opinion of

the court.

The original bill in this case was filed by

Albert Pick & Company, a corporation, July 19, 1913,

in which the complainant alleged that it had recovered

and a judgment for \$755.00 was entered on Feb. 15, 1913,

against Albert D. Kataly and Charles D. Kataly, co-

partners, as Kataly Brothers; that an execution was

issued thereon and returned by the sheriff in no part

satisfied; that the defendants for some years prior

to the judgment, had conducted a restaurant and saloon,

and that in the conduct of the business various per-

sons had become indebted to them; that they had cer-

tain real and personal property which could not be

reached at law, but which ought to be applied to the

payment of the said judgment; that the defendants exer-

cised a corporation, the certificate of incorporation being

recorded in Book Twenty June 20, 1914; that they subscrip-

ed for practically all of the stock and to pay for the

same, had conveyed the personal property which had con-

stituted the assets of the co-partnership, to the corporation; that this transfer was merely colorable and for the purpose of placing the property of the two Natalbys out of their possession so as to hinder and delay creditors; and that the transfer was void in that the parties had failed to comply with the provisions of the Bulk Sales Law of Illinois. The bill prays for full discovery as to all charges made therein, that the transfer of assets from the partnership to the corporation complained of, may be declared void, and that the assets which may be discovered, may be subjected to the payment of the complainant's judgment, and that the defendants may be enjoined from selling, transferring, or encumbering any of their property, and that a receiver may be appointed. About a year later, on July 12, 1916, a motion was made by Silas J. Whitlock as trustee in bankruptcy of the estate of Charles D. Natalby and Albert D. Natalby individually and as co-partners, and also as trustee for Natalby's a corporation, for leave to intervene as a party complainant, and to file an amended and supplemental bill, and the court entered the order allowing the motion; and on the same day, Silas J. Whitlock, as trustee, filed his amended and supplemental bill which recited the fact of the filing of the original bill and the substance of it and proceeded to allege that upon the filing of that bill, the defendants therein named were served with process and appeared and answered and that the cause was thereafter referred to a Master in Chancery who, after hearing, submitted a report to the effect that the conveyance complained of, was fraudulent, and that a receiver of the property should

stated the assets of the co-partnership, to the corporation; that this transfer was merely colorable and for the purpose of placing the property of the two Katalinys out of their possession so as to hinder and delay creditors; and that the transfer was void in that the parties had failed to comply with the provisions of the Bulk-Sale Law of Illinois. The bill prays for full discovery as to all charges made therein, that the transfer of assets from the partnership to the corporation complained of, may be declared void, and that the assets which may be discovered, may be subjected to the payment of the complainant's judgment, and that the defendant may be enjoined from selling, transferring, or encumbering any of their property, and that a receiver may be appointed. About a year later, on July 12, 1916, a motion was made by Elias J. Whitlock as trustee in bankruptcy of the estate of Charles D. Katalin and Albert D. Katalin individually and as co-partners, and also as trustee for Katalin's corporation, for leave to intervene as a party complainant, and to file an amended and supplemental bill, and the court entered the order allowing the motion; and on the same day, Elias J. Whitlock, as trustee, filed his amended and supplemental bill which recited the facts of the filing of the original bill and the substance of it and proceeded to allege that upon the filing of that bill, the defendant therein failed to comply with process and appeared and answered and that the court was thereafter referred to a master in necessary case, after hearing, submitted a report to the effect that the complainant complained of, was fraudulent, and that a receiver of the property should

be appointed, which report was approved and a receiver was duly appointed as prayed for.

This trustee's bill alleged further that on August 6, 1915, an involuntary petition in bankruptcy was filed against the two Natalbys individually and as co-partners, and that they were duly adjudged bankrupts on March 23, 1916, and that the complainant Whitlock was duly elected and appointed trustee for the said bankrupts, May 22, 1916, following which, an order was entered authorizing and directing him as such trustee to file the necessary suit or suits, to have certain notes and mortgages executed by each of the bankrupts to the Miller Brewing Company declared void.

The trustee further alleged in his supplemental bill that the two Natalbys conducted their business as co-partners up to June 30, 1914, at which time they purported to have conveyed their restaurant and saloon to Natalbys, a corporation, and that in and about the conduct of their business as co-partners they contracted an indebtedness aggregating \$88,000.

He alleges further that on January 14, 1913, the two Natalbys entered into an agreement with the Fred Miller Brewing Co. in and by which they agreed to use no beer other than that manufactured by the Miller Brewing Co. provided the Brewing Company would at their request, loan them \$25,000 to be evidenced by their notes to be secured by a first lien on premises therein described, and that pursuant to that agree-

be appointed, when report was approved and a receiver was duly appointed as proved for.

This trustee's bill alleges further that on August 6, 1913, an involuntary petition in bankruptcy was filed against the two Katalyps individually and as co-partners, and that they were duly adjudged bankrupts on March 23, 1916, and that the complainant Whitlock was duly elected and appointed trustee for the said bankrupts, May 23, 1916, following which, an order was entered authorizing and directing him as such trustee to file the necessary suit or suits, to have certain notes and mortgages executed by each of the bankrupts to the Miller Brewing Company declared void.

The trustee further alleged in his said bill that the two Katalyps conducted their business as co-partners up to June 30, 1914, at which time they purported to have conveyed their restaurant and saloon to Katalyps, a corporation, and that in and about the conduct of their business as co-partners they conducted an indebtedness aggregating \$25,000.

He alleges further that on January 14, 1915, the two Katalyps entered into an agreement with the Fred Miller Brewing Co. in and by which they agreed to use no beer other than that manufactured by the Miller Brewing Co. provided the Brewing Company would at their request, loan them \$25,000 to be evidenced by their notes to be secured by a first lien on premises therein described, and that pursuant to that agree-

ment, the Natalbys did thereafter request the Brewing Company to loan them \$25,000 on July 25, 1913 on which date, Albert D. Natalby and wife executed their promissory notes aggregating the sum of \$12,500 to secure which they executed their trust deed conveying to William Volbert, trustee and Silas H. Strawn, successor in trust, certain real estate which we shall designate as lot 19, and that a year later, on July 25, 1914, and pursuant to the same agreement, the same parties executed further notes aggregating the sum of \$2,000, to secure which they executed another trust deed to the same parties as trustee and successor in trust conveying the same lot 19.

The bill further alleges the execution of notes and mortgages by Charles D. Natalby and wife executed on the same dates for the same amounts, to secure which they executed trustdeeds to the same parties, conveying the adjoining property, lot 20.

The trustee further alleges in his bill that on August 2, 1912, Charles D. Natalby and wife executed their notes in the sum of \$2,500 payable \$125.00 on the second day of each and every month for eleven months with a final payment of \$1,125 due 12 months after date, interest at 6 per cent per annum, to secure which they executed their trust deed to Leah Liebman, conveying lot 20, and that Abraham J. Liebman is the owner and holder of those notes.

This bill further alleges that on the same date, Albert D. Natalby and wife executed their promissory

ment, the Hatahyas did thereafter request the following
Company to loan them \$25,000 on July 22, 1913 on which
date, Albert D. Hatahy and wife executed their promiss-
sory notes aggregating the sum of \$15,500 to secure
which they executed their trust deed conveying to Wil-
iam Volpert, trustee and Alice M. Hatahy, successor in
trust, certain real estate which was then designated as
lot 19, and that a year later, on July 22, 1914, and
pursuant to the same agreement, the same parties exe-
cuted further notes aggregating the sum of \$7,000, to
secure which they executed another trust deed to the
same parties as trustees and successor in trust convey-
ing the same lot 19.

The bill further alleges the execution of
notes and mortgages by Charles D. Hatahy and wife exe-
cuted on the same date for the same amount, to secure
which they executed trustdeeds to the same parties,
conveying the adjoining property, lot 20.

The trustee further alleges in his bill that
on August 2, 1912, Charles D. Hatahy and wife executed
their notes in the sum of \$1,500 payable \$125.00 on the
second day of each and every month for eleven months
with a final payment of \$1,125 due 12 months after date,
interest at 8 per cent per annum, to secure which they
executed their trust deed to Jacob Lieberman, conveying lot
20, and that Abraham J. Lieberman is the owner and holder
of these notes.

This bill further alleges that on the same
date, Albert D. Hatahy and wife executed their promissory

notes for the same amounts and in the same terms as to payment and interest, to secure which they executed their trust deed to the same trustee conveying lot 19, and that this indebtedness was afterwards canceled and released of record and the trustee charges the fact to be that these transactions between the Liebman and the two Natalbys are usurious and that both of the loans were made as part of the same transaction and that if an accounting were taken and had, it would show that usurious interest had been paid to Liebman by the Natalbys, and that pursuant to law and in accordance with equity and good conscience, the amount that should be paid to Liebman is much less than the amount of the instruments and has been, in fact, fully paid.

The trustee further alleges in his bill that on November 2, 1915, the Brewing Company filed a bill in the Circuit Court of Cook County seeking to foreclose the mortgages executed by Charles D. Natalby and wife covering lot 20; that the interest of the Brewing Company in this lot by reason of the notes and trust deed executed by Charles D. Natalby and wife is inferior to the claim of the complainant trustee, and that by reason of the fact that these loans are ultra vires and that the Brewing Company is not authorized to do business in the State of Illinois where this transaction was made, the notes and trust deeds are void, and that the Brewing Company should be restrained from further proceeding with their foreclosure suit.

The trustee further alleges that the money described in the notes held by the Miller Brewing Company

note for the same amount and in the same terms as to payment and interest, to secure which they executed their trust deed to the same trustee conveying lot 19, and that this instrument was a furtherance of the fact and release of record and the trustee obliges the fact to be that these transactions between the Liebmanns and the two Natalsys are unimpaired and that both of the loans were made as part of the same transaction and that if an accounting were taken and made, it would show that the amount that had been paid to Liebmann by the Natalsys, and that pursuant to law and in accordance with equity and good conscience, the amount that should be paid to Liebmann is much less than the amount of the instruments and has been, in fact, fully paid.

The trustee further alleges in his bill that on November 2, 1916, the Brewing Company filed a bill in the Circuit Court of Cook County seeking to foreclose the mortgage executed by Charles D. Natalsy and wife covering lot 20; that the interest of the Brewing Company in this lot by reason of the note and trust deed executed by Charles D. Natalsy and wife is inferior to the claim of the complainant trustee, and that by reason of the fact that these loans are inter vivos and that the Brewing Company is not authorized to do business in the State of Illinois, where the transaction was made, the note and trust deeds are void, and that the Brewing Company should be restrained from further proceeding with their foreclosure suit.

The trustee further alleges that the money described in the notes held by the Miller Brewing Company

was never received by the Natalbys or used by them in their restaurant and saloon business but was used to pay off a then existing indebtedness on the two pieces of real estate, lots 19 and 20, which indebtedness was owned by the Joseph Schlitz Brewing Company which held a lien on these two lots by reason of a similar contract to the one later entered into between Natalbys and the Miller Brewing Company.

The bill then alleges that the Miller Brewing Company is a Wisconsin corporation and quotes that part of its charter defining the business which it is thereby authorized to conduct, and alleges that the loans made to the Natalbys represented by their notes given to the Brewing Company were not made pursuant to its corporate powers, and were contrary to the laws of Illinois where the contract and notes in question were executed and that said contract is ultra vires and the notes and trust deeds are null and void.

The bill next recites the provisions of the laws of Illinois requiring the filing of certain statements by corporations organized elsewhere upon which they may be authorized to transact business in Illinois, and that after the Miller Brewing Company had filed such a statement and had been authorized to do business in Illinois, it failed to comply with the Illinois laws requiring the filing of certain annual reports, and that in February, 1909 the Secretary of State canceled the permission of said corporation to transact business in Illinois, since which time the corporation

was never received by the Metairie or used by them in their restaurant and saloon business but was used to pay off a then existing indebtedness of the two estates of real estate, lots 19 and 20, which indebtedness was owned by the Joseph Schlicht Brewing Company which held a lien on these two lots by reason of a similar contract to the one later entered into between Metairie and the Miller Brewing Company.

The bill then alleges that the Miller Brewing Company in a Wisconsin corporation and quotes that part of its charter defining the business which it is thereby authorized to conduct, and alleges that the license made to the Metairie represented by their notes given to the Brewing Company were not made pursuant to its corporate powers, and were contrary to the laws of Illinois where the contract and notes in question were executed and that said contract is void and the notes and that deeds are null and void.

The bill next recites the provisions of the laws of Illinois regarding the filing of certificates of incorporation by corporations organized elsewhere upon which they may be authorized to transact business in Illinois, and that after the Miller Brewing Company had filed such a statement and had been authorized to transact business in Illinois, it failed to comply with the Illinois laws requiring the filing of certain annual reports, and that in February, 1909, the Secretary of State annulled the permission of said corporation to transact business in Illinois, since which time the corporation

has been transacting business in Illinois without any legal authority.

The trustee next alleges that on March 18, 1915, Albert D. Natalby and wife conveyed lot 19 to Anton G. Wille by warranty deed for an alleged consideration of \$1,000.00 subject to encumbrances of record; that at the time of this sale, the property was valued by the parties at \$18,500.00 which was a fair, reasonable market value of the property at that time; that all of the creditors with claims aggregating some \$88,000.00 were creditors of Albert D. Natalby at the time this transfer was made; and that the liens of record referred to, being fraudulent and void, are not liens in fact upon that lot, by reason of which Wille has secured the title for the alleged consideration of \$1,000.00 to the loss of the creditors of Albert D. Natalby to the extent of \$17,500.00; and that it is inequitable and unjust that Wille should receive the property for such alleged consideration to the loss and detriment of the creditors of Albert D. Natalby.

The bill prays that an accounting be had and that it be decreed that the Miller Brewing Company is operating in the State of Illinois without authority, and that the loan made by the Brewing Company was ultra vires and null and void, and that the notes and trust deeds executed by Albert D. Natalby and wife be delivered into court and canceled and released of record, and that it be determined that the conveyance to Wille was in fact fraudulent as to the creditors of Albert D. Natalby

has been transacting business in Illinois without any legal authority.

The trustee next alleges that on March 18, 1915, Albert D. Matally and wife conveyed lot 19 to Anton G. Wille by warranty deed for an alleged consideration of \$1,000.00 subject to encumbrances of record; that at the time of this sale, the property was valued by the parties at \$18,000.00 which was a fair, reasonable market value of the property at that time; that all of the creditors with claims aggregating some \$88,000.00 were creditors of Albert D. Matally at the time this transfer was made; and that the liens of record referred to, being fraudulent and void, are not liens in fact upon that lot, by reason of which Wille has secured the title for the alleged consideration of \$1,000.00 to the loss of the creditors of Albert D. Matally to the extent of \$17,500.00; and that it is inadvisable and unjust that Wille should receive the property for such alleged consideration to the loss and detriment of the creditors of Albert D. Matally.

The bill prays that an accounting be had and that it be decreed that the Miller Brewing Company is operating in the state of Illinois without authority, and that the loan made by the Brewing Company was void and null and void, and that the notes and trust deeds executed by Albert D. Matally and wife be delivered into court and canceled and released of record, and that it be determined that the conveyance to Wille was in fact fraudulent as to the creditors of Albert D. Matally.

and that Wille be ordered and directed to convey said property upon payment to him of the sum he actually paid for it, together with any sum he may be found equitably entitled to, or in the alternative, if the court finds that Wille made such purchase in good faith, that he be allowed to retain it upon paying its value, and that he be confirmed in his title as to any right of any claims of the creditors of Albert D. Natalby upon his paying this complainant the ascertained value of the premises. The bill further prays that all loans made by the Miller Brewing Company and the notes and mortgages given therefor on lot 20 be declared null and void and that lot be decreed to belong to complainant as trustee free from any lien of the said notes or deeds, and that the latter be ordered released of record, that an accounting be had as to the transactions between the Liebman and the Natalbys, and if on such accounting, it shall appear that usurious interest has been paid to the Liebman that proper orders be entered determining such amount and canceling such indebtedness and declaring the notes and trust deeds to Liebman to be no lien or encumbrance upon the property, and that the same be canceled and released of record; that a receiver be appointed to take possession of the property in question and that an injunction issue restraining the Brewing Company from further proceeding with its foreclosure suit in the Circuit Court, and that Wille be restrained from doing anything to cloud the title of lot 19, and that the complainant may have such other and further relief as equity may require.

and that Willie be ordered and directed to convey said property upon payment to him of the sum he actually paid for it, together with any sum he may be found equitably entitled to, or in the alternative, if the court finds that Willie made such purchase in good faith, that he be allowed to retain it upon paying its value, and that he be confirmed in his title as to any right of any claim of the creditors of Albert D. Watalpha upon his paying this complaint the ascertained value of the purchase. The bill further prays that all loans made by the Miller Brewing Company and the notes and mortgages given in refer on lot 12 be declared null and void and that lot be decreed to belong to complainant as trustee free from any lien of the said notes or deeds, and that the latter be entered released of record, that an accounting be had as to the transactions between the Liebmans and the Watalphas, and if on such accounting, it shall appear that monies interest has been paid to the Liebmans that proper orders be entered determining such amount and canceling such indebtedness and declaring the notes and trust deeds void to be no lien or encumbrance upon the property, and that the same be cancelled and released of record; that a receiver be appointed to take possession of the property in question and that an injunction issue restraining the Brewing Company from further proceeding with its foreclosure suit in the circuit court, and that Willie be restrained from doing anything to defeat the title of lot 12, and that the complainant may have such other and further relief as equity may require.

This supplemental bill named the original complainant, Pick & Company, as a party defendant together with Wille, the Miller Brewing Company, the Liebmanns and others.

The defendant Wille filed a special demurrer to the Whitlock supplemental bill, the Brewing Company, a general and special demurrer, and the Liebmanns, a general demurrer.

The following year, on July 31, 1917, pursuant to an order of court, the original complainant, Pick & Company, filed an amended and supplemental bill containing practically the same allegations as those which had been made in the supplemental bill which had been filed by Whitlock, naming as parties defendant, Whitlock, the trustee, and all the defendants named in the supplemental bill which Whitlock had filed, except itself, Pick & Company. On the same day, the court entered an order providing that the several demurrers to the Whitlock supplemental bill were to stand as demurrers to the amended and supplemental bill of Pick & Company.

Thereupon the trial court entered a further order sustaining all three of the demurrers to both supplemental bills. The complainants elected to stand by their respective bills, whereupon the court entered its decree dismissing both supplemental bills for want of equity, from which decree the complainants, Whitlock, trustee in bankruptcy and Pick & Company, have appealed.

with wife, two other living persons, the above
testimony, this is hereby, as a party defendant, sworn
to. This testimony will stand the witness and

The following will find a medical diagnosis
in the United States Bill, the United States
a General and Medical Director, and the following, a
General Director.

[illegible]

...the fact that the ...
...the fact that the ...

We will first consider the demurrers so far as they apply to the supplemental bill filed by Whitlock, the trustee.

The demurrer of Wille to that bill was properly sustained on both of the two special grounds alleged in the demurrer. This bill did not offer to do equity as to Wille. It prayed that he might be decreed to convey the property back upon payment to him of whatever sum he had actually paid for it together with any sum he might be found to be equitably entitled to, but the complainant did not offer to pay Wille the sum which might be so found to be equitably due him.

The rights of Whitlock, the trustee in bankruptcy, as a party complainant against the defendants named in his bill, are such, and only such, as he derives by and through the provisions of the Bankruptcy Law. That act provides that all conveyances of the bankrupt within four months prior to the filing of the petition, made with the intention and purpose on his part to hinder or defraud his creditors shall be null and void as against the creditors except as to purchasers in good faith and for a fair consideration, and that all of such conveyances made by the bankrupt within four months prior to the filing of the petition and while he is insolvent, which are null and void as against the creditors by the laws of the State, shall be deemed null and void as against his creditors under the bankruptcy act and further that the trustee may avoid the transfer by the bankrupt of his property which any creditor of the bankrupt might

the results of the investigation will be made available to the public as soon as possible.

The amount of \$111.15 was paid to the
by remittance on behalf of the two special agents assigned
in the territory. This bill was not paid to the agency
as it was. It should have been paid to the agency to cover
the two property back upon payment to him of the two
and he had actually paid for it before the bill was
he should be found to be actually entitled to, but the
commission did not allow to pay while the two were
about to be found to be entitled to the bill.

the power of Congress, the power is hereby
vested in a party commission against the Government
under the bill, and only such, as in the
view of and through the provisions of the Government
law. That and provision that all members of the
committee shall have complete power in the filling of the
position, made with the intention and purpose of the law
to bind or prevent the committee shall be null and void
as against the committee except as to members in good
faith and for a just consideration, and that all of such
committees made by the Government shall have complete power
in the filling of the position and shall be in accordance
with the law and shall be subject to the provisions of the
law of the state, which be deemed null and void as against
the Government under the authority of the Government that
the Government may avoid the transfer of the property of
the property which any transfer of the Government shall

have avoided and may recover the property so transferred or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of adjudication and it also provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. (Sections 67e, 70e, 47a)

It appears from the face of the supplemental bill filed by Whitlock, that lot 19 was conveyed to Wille by Albert D. Natalby, the bankrupt, more than four months before the filing of the bankruptcy petition. The bill contains no allegations that the conveyance was made with the intention and purpose on the part of Natalby to hinder and defraud his creditors or that he was insolvent at the time of the conveyance or that Wille was not a bona fide purchaser for a fair consideration. It appears from the allegations in the bill that Wille purchased the equity in lot 19 in good faith subject to certain encumbrances. If it develops, as the complainant alleges, that these encumbrances are void, that fact does not give the trustee of the bankrupt estate of the grantor, the right to avoid the conveyance under the facts alleged in this bill. If the trustee has any rights as against Wille under the terms of the Bankruptcy Act, they are the rights of "a judgment creditor holding an execution duly returned unsatisfied," attaching as of the date the title of the trustee attaches. Under the facts alleged in the bill no such creditor had any rights as against Wille. There are no facts alleged, showing or tending to show, that the conveyance to him, regardless

have avoided and may recover the property so transferred or its value, from the trustee as soon as the transferred unless he has a bona fide interest for value prior to the date of adjustment and it also provides that the trustee shall be deemed vested with all the title, knowledge, and powers of a judgment creditor holding an execution duly returned unsatisfied. (Section 575, 576, 577)

It appears from the face of the instrument that the bill filed by Whitlock, that it is not supported by the evidence, that the instrument, was made by Albert D. Whitlock, the husband, and that the bill before the filing of the bankruptcy petition. The bill contains no allegations that the conveyance was made with the intention and purpose on the part of Whitlock to defraud and defraud his creditors or that he was insolvent at the time of the conveyance or that the bill was not a bona fide payment for a fair consideration. It appears from the allegations in the bill that the instrument was made in full in full value and to certain encumbrances. It is averred, in the instrument, that the trustee of the bankruptcy estate of the grantor, the right to avoid the conveyance under the laws of the State of Illinois. It is further averred that the trustee has not taken any steps to avoid the same or the instrument, and, they are the rights of the judgment creditor holding an execution duly returned unsatisfied, attaching as of the date the title of the trustee attached. Under the facts alleged in the bill no such creditor had any rights or claims. There are no facts alleged, showing or tending to show, that the conveyance to him, was made

of the time it was made, was a fraud on creditors.

Considering next the demurrer of the Miller Brewing Company to the bill filed by Whitlock, the trustee, it will be seen that the bill discloses no rights in the complainant as against these defendants so far as lot 19 is concerned for the same reasons that it discloses no rights in him as against the defendant Wille. So far as lot 20 is concerned, the bill discloses that long before the complainant was appointed trustee of the estate of the bankrupts, this defendant had filed a bill in the Circuit Court of Cook County to foreclose the trust deeds conveying lot 20, given to secure the payment of the notes held by the Brewing Company. There is much discussion in the briefs filed by both parties as to whether the action of the Brewing Company in making these loans was ultra vires and whether that company was authorized to transact business in Illinois at the time the loans were made and consequently, whether the trust deeds and notes in question were void and whether such questions can be raised collaterally in such a case as the one at bar and also as to just when the rights of the trustee in bankruptcy obtained, whether as of the date of the filing of the bankruptcy petition or of the adjudication, all of which questions seem to us entirely immaterial. The trustee acquired no right to file a bill until he was appointed and at that time there was, and for some time previous thereto, there had been, pending in the Circuit Court, a bill filed by this defendant to foreclose these same loans, and whatever the rights of the

of the time it was made, was a fraud on or against.

Considering next the summary of the Miller Brewing Company to the bill filed by Whitlock, the trustee, it will be seen that the bill discloses no rights in the complainant as against those defendants so far as for 19 is concerned for the same reasons that it discloses no rights in his as against the defendant Miller. So far as for 20 is concerned, the bill discloses that long before the complainant was appointed trustee of the estate of the bankrupts, this defendant had filed a bill in the District Court of Cook County to foreclose the trust deeds conveyed for \$50, given to secure the payment of the notes held by the Brewing Company. There is also a question in the bill filed by both parties as to whether the action of the Brewing Company in making these loans was ultra vires and whether that company was authorized to transport business in Illinois at the time the loans were made and consequently, whether the trust deeds and notes in question were valid and whether such questions can be raised collectively in such a case as the one at bar and also as to what was the rights of the trustee in bankruptcy obtained, whether as of the date of the filing of the bankruptcy petition or of the adjudication, all of which questions seem to me entirely immaterial. The trustee admitted no right to file a bill until he was appointed and at that time there was, and for some time previous thereto, there has been, pending in the District Court, a bill filed by this defendant before those three loans, and whatever the rights of the

trustee were as to lot 20 or as to the notes and trust deeds held by this defendant, he could not assert them by filing a bill, whether original or supplemental, in a court whose jurisdiction is concurrent with that of the Circuit Court, where the foreclosure action was pending, seeking a decree restraining the further prosecution of the foreclosure suit and declaring the notes and trust deeds involved in that suit void and directing that they be canceled. But it was both his right and his duty as such trustee, upon finding that a foreclosure suit was already pending in the Circuit Court involving these very notes and trust deeds, to which suit his bankrupts, the makers of the notes and grantors of the trust deeds, were parties defendant, to intervene in that suit and not come into such an action as the one at bar.

As to the demurrer filed by Liebman, it is our opinion that it also was properly sustained to the supplemental bill filed by Whitlock, the trustee. The allegations of the bill involving the Liebman loans are very confusing and indefinite. The bill recites that these loans are usurious and that the amount now due on the notes secured by trust deed conveying lot 20 is much less than the face of the notes and it is also alleged that these notes were executed as a part of the same transaction involving the notes secured by trust deed

trustees were as to let \$5000 to the notes and trust deeds held by this defendant, he could not assert that by filing a bill, without bringing an application, is a right where application is necessary and that in the Circuit Court, where the foreclosing action was pending, seeking a decree vesting the property in the trustee of the foreclosing and not releasing the notes and trust deeds involved in that suit and this being that they be cancelled. But it was held that the duty of such trustees, upon finding that a foreclosure suit was already pending in the Circuit Court involving these very notes and trust deeds, to which suit was brought, the review of the notes and trustee of the trust deeds, were parties defendant, as interested in that suit and not into when on motion as the one at bar.

As to the counter filed by defendant, it is the opinion that it also was properly sustained to the same extent as the bill filed by plaintiff. The same allegations of the bill involving the foreclosing loans are very convincing and indisputable. The bill recites that these loans are authentic and that the amount was on the notes secured by first class property for \$5000 each less than the face of the notes and it is also alleged that these notes were executed as a part of the same transaction involving the notes secured by trust deeds

conveying lot 19, which latter had been canceled and released of record and that therefore the former notes have in fact been paid in full. The bill prays that an accounting may be had between the Liebman and the Natalbys, and that if it appears that usurious interest has been paid, the amount shall be determined and the notes canceled and the trust deeds declared no lien or encumbrance on the property. The bill does not offer to do equity as to Liebman in case it is found that any sum is equitably due him on his notes. From the allegations contained in the bill, it appears that the Liebman loans are entirely regular and not usurious. All allegations in the bill to the contrary are conclusions merely and the bill for that reason was properly held bad on this demurrer.

We will now consider these several demurrers so far as they apply to the supplemental bill filed by the original complainant, Pick & Company.

The demurrer of Wille was properly sustained to that bill also. It appears from the face of the bill that the complainant recovered its judgment against Wille's grantor in February, 1915, and that the conveyance to Wille was made a month later. It appears further from the face

conveying lot 19, which latter had been conveyed and
evidence of record and that therefore no further notice
have in fact been paid in full. The bill gives rise
an accounting may be had between the life tenant and the
remaindermen, and that it is necessary that matters in-
respect her debt paid, the account shall be determined
and the notes canceled and the trust needs declared
no lien or encumbrance on the property. The bill
does not offer to do equity as to life tenant in case
it is found that any sum is actually due him on his
notes. From the allegations contained in the bill,
it appears that the life tenant has not entirely repa-
ied and not satisfied. All allegations in the bill
to the contrary are conclusions merely and the bill
for that reason was properly held on this de-
claratory.

The bill was considered there several days
and the court held that the supplemental bill filed by
the original complainant, Pick & Company.

The decretory of Wills was properly sustained to
that bill also. It appears from the face of the bill that
the complainant recovered the judgment against Wills's
estate in January, 1910, and that the mortgage on Wills's
was made a month later. It appears further from the facts

of the bill that the title to the lot conveyed to Wille was registered under the Torrens Act, and that no certificate of the judgment recovered by Pick & Company was ever filed with the Registrar of Titles, (although an attempt to file it was made some time after the conveyance to Wille) and therefore that conveyance was in no way affected by the judgment as it never became a lien against the property under the provisions of the Torrens Act with regard to judgments. The appellant contends that these provisions of the Torrens Act to the effect that a judgment shall not be a lien upon registered land until a certificate or certified copy thereof is filed in the office of the Registrar and a memorial of the same is entered upon the register of the last certificate of the title to be affected, are unconstitutional in that they violate Section 29 of Article VI of the Constitution providing that the force and effect of judgments shall be uniform. It has been repeatedly held that this court has no authority to declare any act of the Legislature unconstitutional and void. If this case involved the constitutionality of the Torrens Act, or any part of it, the appeal should have been taken to the Supreme Court and not to this Court. But the case cannot be said to involve the validity of that Act within the meaning of the statute for it appears that its validity was not questioned in the trial court. C.C.C. & St.L. R. Co. v. McGrath, 195 Ill. 104; Opaque Cloth Shade Co. v. Veight, 161 Ill. 337. Appellants' contention that this provision of the Torrens Act as to judgments, is unconsti-

tutional appears for the first time in its reply brief.

The bill alleges no facts showing any equities whatever in Pick & Company as against Wille, either under section 49 of the Chancery Act, or any other law.

As to the demurrer of the Miller Brewing Company to the supplemental bill filed by Pick & Company, it will be seen (as in the case of the Whitleck bill) that the bill discloses no right in the complainant as against these defendants as far as lot 19 is concerned for the same reasons that it discloses no rights in it as against the defendant Wille. As to lot 19, the question of whether the Brewing Company's notes are valid and a good lien is wholly immaterial so far as Pick & Company are concerned for even if they were void, it avails them nothing for the title is out of the makers of these notes and is free and clear of any lien by reason of the judgment of Pick & Company.

As to lot 20, the supplemental bill of Pick & Company is also demurrable, so far as the Brewing Company is concerned. Pick & Company was a judgment creditor of the Natalbys with a good judgment lien against lot 20, subject, however, to such rights as the Brewing Company might have in that property, by virtue of their mortgage which was prior to the recovery of the Pick & Company judgment. It appears from the allegations contained in the bill filed by Pick & Company that a certified copy of the judgment they had recovered against the Natalbys was filed with the registrar of titles on April 14, 1916. It appears further that the east twenty feet of lot 20 is registered under the provisions of the Torrens Act,

and that the west thirty feet of that lot is not registered. The bill also alleges that the execution which was issued on the day following the recovery of the judgment in February, 1915 was duly returned, in no part satisfied in May of that year. The judgment, therefore, became a lien as against the west thirty feet of lot 20, six months before the Brewing Company filed their foreclosure suit. As a judgment creditor, with a valid lien against the property involved in the foreclosure suit, subject to such rights as the complainant in that foreclosure suit may have, by reason of its notes secured by the trust deeds sought to be foreclosed in that suit, Pick & Company could obtain full relief in that foreclosure suit itself. Horn v. The Volcano Water Co., et al., 13 Cal. 62; Ex Parte Mobly, 19 S. C. 337; Wightman v. Yaryan Co. 217 Ill. 371. In the latter case at page 377, our Supreme Court says that "parties having an interest in the subject-matter in equity who are either necessary or proper parties to such suit if not made so by the plaintiff may come in by way of application to intervene and be made parties complainant or defendant to the end that their interests may be adjudicated and protected." In Wehrheim v. Smith, 226 Ill. 346, at page 350, the Supreme Court speaking of a judgment creditor occupying a position analogous to that of Pick & Company here, says that such creditor was not only a proper party to the foreclosure proceeding, but was a necessary party if the mortgagee sought by those proceedings to affect in any way the rights and interests of the judgment creditor in the premises. A bill will not lie by Pick & Company in a court whose jurisdiction is concurrent with that in which the foreclosure suit is

and that the west entry test of that lot is not regular-
tated. The bill also alleges that the respondents who were
issued on the day following the recovery of the judgment
in February, 1913 was duly returned, in no part satisfied
in any of that year. The judgment, therefore, became a
lien on almost the west entry test of lot 20, six months
before the Housing Company filed its foreclosure suit.
as a judgment creditor, with a valid lien against the
property involved in the foreclosure suit, entitled to
such rights as the complainant in such foreclosure suit
may have, by reason of the same entered by the court
deeds ought to be foreclosed in that suit, with a company
which again will testify in that foreclosure suit itself.
Smith v. The Housing Loan Co., et al., 13 Cal. 2d 121.
Copy. 10 A. C. 327; Housing v. Housing Co. 217 Cal. 211.
In the latter case at page 217, our Supreme Court says
that "parties having an interest in the subject-matter
in equity who are without necessity or proper permission to
intervene will it not come up by the plaintiff may come in
by way of application to intervene and be made parties
complainant or defendant to the suit and that their interests
may be adjudicated and protected." In Housing v. Smith,
210 Cal. 240, at page 250, the Supreme Court speaking
of a judgment creditor occupying a position analogous
to that of a company here, says that such creditor was
not only a proper party to the foreclosure proceedings, but
was a necessary party to the proceedings brought by them
proceedings to effect in law any and all rights and interests
of the judgment creditor in the premises. A bill will
and lie by first a company in a court whose jurisdiction
is concerned with them in view of the respondents who is

pending, seeking an injunction restraining that suit and the avoidance and cancelation of the notes and deeds there involved. A foreclosure suit will not be enjoined for the relief of one who might obtain full relief in that suit itself. 22 Cyc. 816; Waymire v. San Francisco etc. Ry. Co. 112 Cal. 646; Wilson v. Baker, 64 Cal. 475. The fact that the parties to the injunction proceeding are not the same as the parties to the proceeding sought to be enjoined, does not relieve the case from the operation of the rule, which is for the purpose of protecting the rights of courts rather than parties, to avoid conflict of jurisdiction and to prevent confusion and delay in the administration of justice. Crowley v. Davis, 37 Cal. 268.

High in his work on Injunctions at Sec. 52 says that it is a well established rule that "an injunction will not be granted to stay proceedings in the same court of equity, either upon the application of the parties to the proceedings sought to be enjoined, or of strangers to such proceedings, since a departure from the rule would lead to interminable litigation." That author says farther that in situations where the applicant for the restraining order can ordinarily avail himself of all his equities with full effect, in the proceedings sought to be enjoined, a court of equity will not enjoin such proceedings when no reason is shown why the party claiming to be aggrieved cannot protect himself by interposing his defense in the former suit. We deem these principles applicable to the situation in the case at bar. The bill does not allege that the

[illegible]

complainant cannot get full relief in the foreclosure proceeding or that it could not secure such relief there as expeditiously as it could by a separate bill.

The Liebman demurrer was properly sustained to the supplemental bill filed by Pick & Company for the same reasons it was properly sustained to the supplemental bill filed by Whitlock, the trustee in bankruptcy.

It is urged generally by the appellees in support of the demurrers that both supplemental bills were subject to demurrer in that they were not germane to the original bill of Pick & Company and were not properly filed as amendments thereof or supplemental thereto. Where the parties are at issue upon the original bill and facts arise which show that it is necessary to pray for further relief or for additional discovery or if new charges are required to be made, it is proper to bring such additional matter into the case by supplemental bill. A supplemental bill may also be brought not only to insist upon the relief already prayed for in the original bill, but upon the other relief different from that which was prayed for in the original bill, where facts which have since occurred, may require it. (Story's Equity Pleading, Sections 335 - 336).

Certainly, as the appellees contend, the pleadings of the appellants involved here are very unusual and inartificial, as to the various parties

amendment cannot be left in the Committee
pending or that it could not be made
there as expeditiously as it could by a separate bill.

The House Committee was properly instructed
to the amendment bill filed by the Company for
the same reason it was previously mentioned in the
amendment bill filed by the Company, the House in
order.

It is urged generally by the Committee in
support of the amendment that the amendment bill
was subject to amendment in that they were not
in the original bill of the Company and was not
properly filed or introduced in the original
bill. Where the House was at issue upon the
original bill and the House was at issue upon the
amendment to bring the House to the original
amendment or it was changed and referred to the
it is proper to bring such additional matter into
case by supplemental bill. A supplemental bill may
also be brought not only to insert upon the bill
firstly passed for in the original bill, but upon
the other bill different from that which was referred
for in the original bill, where there was any
occurred, may resolve it. (House's Bill, 1880,
Section 334 - 335).

Generally, as the amendment cannot, the
passing of the amendment involved more than
usual and intricate, as to the House's Bill.

involved, but we have not considered that question, inasmuch as our opinion is that all the demurrers were properly sustained to both supplemental bills, on other grounds.

For the reasons given, the decree of the trial court is affirmed.

AFFIRMED.

231 - 23876

THE G. H. HAMMOND COMPANY,
a corporation,

Appellee.

vs.

GEORGE E. FORD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 490

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action of the first class in the Municipal Court of Chicago brought by The G. H. Hammond Company, hereinafter referred to as the plaintiff against George E. Ford, hereinafter referred to as the defendant. The action was based upon a contract wherein the plaintiff agreed to furnish cold storage facilities for an amount of apples equal to 5000 barrels for which the defendant agreed to pay the charges specified in the contract. By the terms of this contract, the plaintiff undertook to maintain in its warehouse, a temperature of thirty-one to thirty-two degrees Fahrenheit, except during such times, as apples would be taken in and out of storage, after which times, the plaintiff was allowed a reasonable time to secure the temperature called for. It was further provided in the contract that if the defendant did not store with the plaintiff, an amount of apples equal to 5000 barrels, he should pay to the plaintiff for the space reserved by it for him, a sum equal to fifty cents per barrel, for the season.

1975 - 1980

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

DEATHS

and the evidence was James Earl Ray's signature. . .

25

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

Values in parentheses are the 95% confidence intervals.

12. The author is most likely to agree with which of the following statements?

Journal of the American Statistical Association

*United States restricted as necessary to international

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

10-11-68

which should be used by all citizens as a guide.

all persons of 18 years of age and over, will be

no. 31161415 will offer you a lot with collected day 21

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Journal of Management Education 35(10) 1139-1154

The storage season involved in this case was that beginning in the fall of 1914 and extending to the following May. During this season, the defendant stored 3434 barrels of apples with the plaintiff under the contract. The plaintiff's claim consists of two items. By the first one, the plaintiff alleges that there is due it from the defendant, the sum of \$1,285.83 for storage and cartage charges on the apples stored with it by the defendant. Under the second item, the plaintiff claims \$783.00 as liquidated damages for the alleged failure of the defendant to store 1566 barrels of apples at the rate of fifty cents per barrel, that number being the difference between the 5000 barrels mentioned in the contract, and the 3434 barrels which the defendant placed in storage with the plaintiff under the contract. Following the filing of the statement of claim made by the plaintiff, the defendant filed an affidavit of merits in which, he denied owing the plaintiff anything, under the contract, and alleged that nothing was due from him to the plaintiff "by reason of the failure of the plaintiff to fulfill its part of the alleged contract with reference to temperature, and to exercise reasonable care and diligence in protecting said apples from deterioration." The defendant further denied owing the plaintiff the item of \$783.00, alleging, among other things, that the plaintiff had waived any right it might have had to require the defendant to store the full amount of 5000 barrels called for by the contract. The defendant also filed a statement of claim for set-off, alleging that by reason of the failure of the plaintiff to maintain the temperature contracted for, the apples contained in certain specified lots, making up eight car-

The above named person is this case and that person
 was in the fall of 1935 and according to the following
 Mr. Henry John Brown, the defendant stated that
 records of the case with the plaintiff were in the
 The plaintiff's name appears at two times. On the
 first one, the plaintiff alleged that there is a law
 in the amount, the sum of \$1,000.00 for the state and that
 was taken to the state and that it is the defendant's
 duty to return it, the plaintiff claims \$1,000.00 as
 liquidated damages for the alleged failure of the defendant
 and to state that records of the case at that
 time are in the state, that records being the defendant's
 between the 1935 records mentioned in the witness, the law
 said records which the defendant claims to return with
 the plaintiff under the contract. Between the claim
 of the defendant on claim made by the plaintiff, the
 defendant filed an affidavit of service in which he stated
 under the plaintiff's signature, under the witness, and the
 signed that nothing was done and to the plaintiff of
 records at the time of the plaintiff in which the
 part of the alleged witness with reference to liquidated
 and to recover damages now and liquidated damages
 the said records from the plaintiff. The defendant further
 stated that the plaintiff has been at \$1,000.00, claiming
 money other things, that the plaintiff has asked for that
 it should have been to provide the defendant to give the
 full amount of \$1,000.00 which was the sum of the
 The defendant also filed a statement of claim for money,
 claiming that he found at the time of the plaintiff
 to maintain the defendant's witness, that the witness
 mentioned in writing concerning that, which he stated was

leads, which were in good condition when placed in storage with the plaintiff in the fall, deteriorated and it became necessary to repack them and withdraw them from storage and sell them for less than the defendant could and would have received for them at their fair market value if he had been able to withdraw them from storage in good condition, at the proper season. In his set-off, the defendant claimed damages in the sum of \$1,325.25.

A trial was had before a jury, resulting in a verdict in favor of the plaintiff for the sum of \$1,487.98. During the consideration of the defendant's motion for a new trial, the plaintiff filed a remittitur for \$391.50 upon the court's suggestion, whereupon the motion for a new trial was overruled, and judgment was entered against the defendant for \$1,096.48, from which, the defendant has appealed. The defendant has assigned errors affecting both items of the plaintiff's claim and the plaintiff has assigned cross errors as to matters affecting the defendant's claim for set-off.

At the close of the plaintiff's case, the defendant made two motions, the first asking the court to instruct the jury to find the issues for the defendant on the ground that the plaintiff had not made out a case, and the second asking the court to instruct ^{the jury to find} ~~the issues~~ for the defendant as to the item of \$783.00. The court overruled the first motion, and took the second one under advisement. The defendant urges that the trial court erred in denying the first motion, but we are of the opinion that it was properly overruled. The plaintiff had made out a prima facie case as to its first item of claim, by putting

[illegible]

A small number of cases of

Attorney for defendant's claim for return.

[illegible]

the defendant on the stand under Section 33 of the Municipal Court Act, and through him, submitting to the jury, testimony, to the effect, that an itemized account of the storage and cartage charges, making up this item, which was shown the witness, had been checked up by his employees in June, 1915, and that it correctly stated the amount that the defendant's books showed was due the plaintiff after being so checked up. The issues raised by the affidavit of merits as to the alleged failure of the plaintiff to do the various things called for, on its part, under the terms of the contract, were matters of defense, but it was not incumbent upon the plaintiff to introduce any proof thereon in connection with presentation of its own case. Further, the defendant is not in a position to urge the denial of his motion as error, inasmuch as the record discloses that the motion was not renewed at the close of all the evidence.

After the defendant had rested his case, the trial court denied the motion which had been made at the close of the plaintiff's case to instruct the jury to find the issues for the defendant as the second item of the plaintiff's claim, and this ruling has also been assigned as error, and is properly before us, inasmuch as the evidence which followed it in rebuttal, had nothing to do with the issues involved in that item. This motion should have been allowed, as the evidence establishes a waiver on the part of the plaintiff to insist upon compliance with the terms of the contract, on the part of the defendant, to the full extent of the 5000 barrels mentioned in the contract. The evidence

shows that in the early part of the storage season in the fall, the defendant talked with a Mr. Gadsen, representing the plaintiff, telling him that his shipments were running shorter than he had anticipated, and that he feared he would not be able to fulfill his contract for the entire amount of 5000 barrels, but that, if the plaintiff insisted upon his making the contract good, he would go out on the street and buy enough apples to fill the contract up, to which Mr. Gadsen replied, according to the defendant's testimony, "You do not need to do that. Just simply do the best you can with us," and according to Mr. Gadsen's testimony, "We are not technical, but do the best you can." This was clearly a waiver on the part of the plaintiff as to performance by the defendant to the full extent of 5000 barrels, provided Mr. Gadsen had proper authority to bind the plaintiff in that regard, which the plaintiff denies. The evidence shows, however, that Mr. Gadsen was the manager of the plaintiff's storage warehouses, and that he negotiated the dealings with the defendant that led to the consummation of the contract involved in this suit; and the evidence further shows that he had charge of the soliciting of storage business for the plaintiff and general charge of their storage plant, and that he had authority to make these storage contracts without submitting them to the plaintiff, and as he put it in his testimony "The Hammond Company are bound by whatever business I get." It seems clear, therefore, that his conversation with the defendant, to which we have referred, was a waiver of this provision of the contract, and that his authority to represent the plaintiff was broad enough to include such waiver.

The defendant further assigns certain errors having to do with his claim for set-off. Whether or not any of these are well taken, is immaterial, however, inasmuch as the defendant failed to make out a case on his set-off, and under the evidence, was not entitled to any allowance under it, and therefore, any errors that may have been committed in connection with the issues involved in the set-off, can not be said to have injured him. Under this claim for set-off, the defendant sought to show that certain lots of apples aggregating eight cars, had been partially spoiled in storage, by reason of improper care, and the failure of the plaintiff to maintain proper temperatures as called for in the contract. There was evidence tending to supply all of the elements involved in this claim for set-off, except as to the measure of damages. If the evidence supported the set-off, the defendant's measure of damages was the difference between the fair market value of the apples involved, if they had been withdrawn from storage in good condition at seasonable times, and the amount, the defendant was able to obtain for them in their damaged condition. The state of the evidence is such as to make it utterly impossible to arrive at any conclusion as to what the damages of the defendant were as to these apples involved in the claim for set-off. In the first place, the evidence does not show with any reasonable definiteness, what these eight cars of apples consisted of. The testimony showed that they consisted of Ganos, Ben Davis, Winesaps, and Willow-twigs. One witness says "they were mostly Ben Davis and Wine-sap with the Ben Davis predominating."

And another witness says "there were a few Willow-twigs, Ganos, and different varieties in between - Ben Davis and Wine-saps predominating." Another witness says "there were Ben Davis, Ganos, Willow-twigs, and some Wine-saps. There were more Ben Davis than any other variety." The evidence discloses nothing further as to how many barrels of these different kinds of apples were involved in this claim for set-off, and the only testimony in the record as to the fair market value of such apples in good condition, was the statement of one witness to the effect that, in the spring of 1915, the fair market value of Ben Davis apples ran from \$3.50 to \$4.00 a barrel. There were also in evidence thirty-three Daily Trade Bulletins for different days in April and May of 1915, containing the names of the apples referred to, and giving certain prices, but we have not been able to find any testimony in the record showing, or tending to show, that the prices as contained in these trade bulletins, correctly represent the fair market value of these various kinds of apples on the dates given in the bulletins. As pointed out by the plaintiff, it may well be that these sets of figures given in the bulletins are asking prices and bids, but in any event, the record is such as not to warrant any inference that they are statements of fair market values. As to this claim for set-off, the record is also silent as to what the defendant realized from the sale of the apples involved, in their alleged damaged condition. Apparently, the defendant endeavored to make out this element of proof on his set-off, by means of the market reports just referred to. The testimony was, that by reason of the deterioration of these

apples due to improper temperatures and lack of the right sort of care, it became necessary to repack them and dispose of them as repacked goods. The trade bulletins in question, contain an item reading "repacked, discolored, or off in condition, different kinds" giving prices.

Again the proof is deficient in failing to show that the prices appearing in these bulletins represent the fair market value of such apples, but even though that element was contained in the record, the defendant's case on his set-off would still be short of the proof necessary to enable him to recover anything under it, because there is no testimony anywhere in the record to the effect that the defendant received, upon the sale of the damaged apples, the fair market value of apples "repacked, discolored, or off in condition." The defendant's testimony was to the effect that it was impossible for him to tell just what he did get for these apples when they were sold, and in an effort to provide a proper basis for the estimate of his damages, he sought, by means of the trade bulletins in question, to show what these kinds of apples were bringing at the times the apples involved in the set-off, were sold. But, as we have stated, the figures submitted are not shown to be the then fair market value of these apples, and in addition, they are not shown to have been sold for their then market value, and so far as the evidence in the record is concerned, the defendant may have sold them considerably above the figures appearing in the trade bulletins. Any allowance in favor of the defendant under the claim for set-off, was, therefore, entirely unwarranted by the evidence.

As to evidence submitted by the defendant in meeting the first item of the plaintiff's claim, which was for storage and cartage charges on such apples as the defendant stored with the plaintiff, there was evidence tending to show the presence of higher temperatures than those specified in the contract, and a resulting tendency of the deterioration of the apples, and the question of whether the difference in temperature as so shown by the evidence, had resulted in any deterioration of the defendant's apples, and if so, to what extent, was submitted to the jury, and we are not able to say that they did not make the proper allowances under the issues involved in this part of the case.

As the jury merely found the issues for the plaintiff and assessed its damages at the sum of \$1,487.98, we have no means of knowing just which items they allowed, and which they disallowed. Under all the evidence, we consider the final judgment entered in favor of the plaintiff in the sum of \$1,096.48 as doing justice between the parties on the issues involved, and therefore, that judgment will be affirmed, the record being without reversible error under all the facts.

AFFIRMED.

error under all the facts.

must all be written, the record being without reversible
 parties in the lower involved, and therefore, that judge
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 together for final judgment entered in favor of the plain-
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 as the jury found there the amount for the

256 - 23601

THE BLAISDELL MACHINERY CO.,
a corporation,

Appellant,

vs.

FRANK VOIGHTMANN and
DOLLY GASOLINE EXTRACTING CO.,
a corporation,

Appellees.

211 I.A. 492

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action brought by the appellant, The Blaisdell Machinery Co., a corporation, hereinafter referred to as the plaintiff, against the Dolly Gasoline Extracting Co., a corporation, and Frank Voightmann. Service of process was had on Voightmann only and we shall refer to him as the defendant.

The Dolly Gasoline Extracting Co. purchased certain machinery from the plaintiff for the sum of \$2989.11, and offered its notes for the purchase price which the plaintiff refused to accept. After some negotiations, the Dolly Gasoline Extracting Co. offered its bond with the defendant as surety, in addition to its notes, and this was accepted by the plaintiff and the machinery was duly shipped. The notes were dated December 30, 1913, and were payable two, four and six months after date. The first one was paid March 26, 1914; the last two have never been paid. In July, 1916, this suit was begun on the bond which is in the following words:

SONA II

U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

• www.1911.com

10

• SWOPE 15

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

• Spelling

and he has been all over the world since then.

• 8700

There is no action taken by the court.

THE UNIVERSITY OF CHICAGO LIBRARY

Reference is made to the following:

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7. Some who say that the world is not real, that it is only a dream, are mistaken. The world is real, and it is our duty to make the best of it.

FORM 1041-100 (Rev. 1-78)

© 2000 Blackwell Science Ltd, *Journal of Internal Medicine* 247: 395–401

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1994-1995

1914; The first two days were very dry.

1101 and 1102 are the only two in the series.

"KNOW ALL MEN BY THESE PRESENTS, that we, Dolly Gasoline Extracting Co., a corporation, of the State of Illinois as principal, and Frank Voightmann of Chicago, Illinois, as surety are held and firmly bound unto the Blaisdell Machinery Co. of Bradford, Pa. and to its successors and assigns in the penal sum of three thousand and no/100 (3,000.00) dollars lawful money of the United States for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly, severally, and firmly by these presents:

WITNESS OUR HANDS AND SEALS THIS DAY
OF DECEMBER, A.D. 1913.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that, whereas, the above bounden Dolly Gasoline Extracting Co. have executed three notes all dated December 1913 payable to the order of The Blaisdell Machinery Co. of Bradford, Pa., one for the sum of one thousand (\$1,000.00) dollars due two (2) months after its date, another for the sum of one thousand (\$1,000.00) due four (4) months after its date and another for nine hundred eighty-nine and eleven/100 (\$989.11) dollars due six (6) months after date, all payable at Bradford, Pa. with interest at six per cent (6%) per annum which notes are given for the unpaid balance of the purchase price of a bill of machinery sold by said Blaisdell Machinery Co. to said Dolly Gasoline Extracting Co.

Now, if the said Dolly Gasoline Extracting Co. shall and do, from time to time and at all times hereafter, defend, save, keep harmless and indemnify the said Blaisdell Machinery Co. as aforesaid, its heirs, successors or assigns and all and each of them, of and from all actions, suits, costs, charges, demands, loss and expenses whatsoever (including attorney's fees) which shall or may at any time hereafter, happen or come to them or either of them for or by reason of the non-payment by said Dolly Gasoline Extracting Co. of said notes, then this obligation to be void, otherwise to remain in full force and effect.

DOLLY GASOLINE EXTRACTING CO.,
By THOMAS R. BARRON, PRES.
FRANK VOIGHTMANN (SEAL)*

After the plaintiff had closed its case, the court instructed the jury to find the issues for the defendant on the ground that the plaintiff had not made out a case. Judgment for the defendant followed, from which the plaintiff has appealed.

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES,
OF THE STATE OF NEW YORK:
I have the honor to acknowledge the receipt of your
favorable report of the 10th inst., and in reply to
inform you that the same has been forwarded to the
proper authorities for their consideration. I am,
very respectfully,
Yours obedient servant,
J. B. HARRIS,
Clerk of the Assembly.

[illegible][illegible]

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

From which the plaintiff was excluded.

The plaintiff contends that the liability of the defendant, under this contract, is a primary one, and the defendant, on the other hand, takes the position that his obligation is collateral. By the words used in the contract between these parties, the defendant is described as a "surety". As a general rule, a surety is an original promisor and debtor from the beginning. His obligation is a primary one and not collateral. Brandt on Suretyship and Guaranty, Sec. 2, 32 Cys. 21

In determining what the contract between given parties is, the words by which the obligation has been expressed, must prevail over those by which the parties may have described themselves. The contract involved here was quite separate and apart from the notes, although it had to do with the notes. By the words used in this contract, the defendant did not undertake that the notes would be promptly paid at maturity. The operation of the contract was limited to a condition that might arise only in case the notes were not paid at maturity, for by the words we find in this contract, expressing the defendant's obligation, he undertook, that his principal would indemnify the plaintiff for all loss and expense, including law suits and attorney's fees, which might happen or come to the plaintiff by reason of the non-payment by the principal, of the notes in question. That was the obligation he entered into, and being a surety, his liability may be said to be a primary one as to that obligation. As to the notes themselves and their payment at maturity, his obligation as expressed in this contract, was such as to

The plaintiff contends that the liability of the defendant, under this contract, is a primary one, and the defendant, on the other hand, takes the position that his obligation is collateral. If the words used in the contract between these parties, the defendant is described as a "surety". As a general rule, a surety is an original promisor and does not have the liability. His obligation is a primary one and not collateral. Hence no suretyship was intended, Sec. 2, of Chap. 11.

In determining what the measure of damages is, the words by which the obligation was expressed, were given great weight by the court. The contract involved may have described the defendant. The contract involved here was quite different and apart from the words, although it was made with the same. If the words used in this contract, the defendant did not undertake that the notes would be paid by the plaintiff. The court said that the contract was limited to a condition that notes would be paid by the plaintiff. It was not held as a condition, but by the words we find in this contract, expressing the defendant's obligation, to understand, that his principal would be liable for all loss and expense, including law suits and attorney's fees, which might be incurred on account of the notes in question. That was the obligation of the notes in question. That was the obligation of the notes in question, and being a surety, his liability was as to the notes themselves and not the contract. As to the notes themselves and not the contract, and as to the obligation he expressed in this contract, and as to

make his liability a collateral one.

It will readily be seen that before the plaintiff, in a suit on this contract, seeking to enforce the defendant's primary liability on his obligation as expressed in the contract, can be said to have made out a prima facie case, evidence must be introduced showing, or tending to show, first, that the notes are past due and unpaid, and second, that the plaintiff has suffered loss or expense by reason of the failure of the principal to pay the notes when they fell due. This, the plaintiff failed to do. It appeared from plaintiff's evidence that the first note for \$1,000.00, had been paid, and that the remaining two were past due and had not been paid. But it was not shown that this had occasioned the plaintiff any loss. On the contrary, it affirmatively appeared that the value of the consideration for the notes, namely, the machinery which the plaintiff had sold defendant's principal, and for which, the notes were given, was being seriously contested by the latter. The plaintiff may feel that the defendant should not be permitted to go into or raise that question in a suit on his contract of suretyship. But the plaintiff saw fit to accept the contract of suretyship, by which, the defendant did not become surety for the payment of the notes at maturity, but for the indemnification of the plaintiff for such loss or damage as it might suffer because of the non-payment of the notes, and the plaintiff will be bound by the terms of the contract it has seen fit to accept. Plaintiff has called our attention to Pfaffler v. Kau, 207 Ill. 116; Ewen v. Wilbor, 208 Ill. 492; Mary. Blanc & Co. v. Jacobson.

make his liability a collateral one.

It will readily be seen that before the plaintiff, in a suit on this contract, seeking to enforce the defendant's primary liability on his obligation as expressed in the contract, can be said to have made out a prima facie case, evidence must be introduced showing or tending to show, first, that the notes are past due and unpaid, and second, that the plaintiff has suffered loss or expense by reason of the failure of the principal to pay the notes when they fell due. This, the plaintiff failed to do. It appeared from plaintiff's evidence that the first note for \$1,000.00, had been paid, and that the remaining two were past due and had not been paid. But it was not shown that the defendant had guaranteed the plaintiff any loss. On the contrary, it affirmatively appeared that the value of the consideration for the notes, namely, the machinery which the plaintiff had sold defendant's principal, and for which the notes were given, was being seriously contacted by the latter. The plaintiff may feel that the defendant should not be permitted to go into or raise that question in a suit on his contract of suretyship. But the plaintiff saw fit to accept the contract of suretyship, by which, the defendant did not become surety for the payment of the notes at maturity, but for the indemnification of the plaintiff for such loss or damage as it might suffer because of the non-payment of the notes, and the plaintiff will be bound by the terms of the contract if he has seen fit to accept. Plaintiff has called our attention to Wright v. Linn, 207 Ill. 110; and Y. v. Linn, 207 Ill. 423; Wright v. Linn, 207 Ill. 110.

149 Ill. App. 240. None of these cases are in point, for, in all of them, the obligation involved, was for the prompt payment of notes as they matured, and was not such a contract as is involved in the case at bar.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

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for, in all of these, the condition involved, was for
the purpose of payment of notes as they matured, and was not
such as to be involved in the same as here.

Nothing no error in the record, the judgment
of the Municipal Court will be affirmed.

ATTORNEY.

420 - 23765

WEARCRETE ENGINEERING COMPANY,
a corp.,

Appellee,

vs.

NEWTON ENGINEERING COMPANY,
a corp.,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

211 I.A. 494

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a suit in attachment brought by the Wearcrete Engineering Company, hereinafter referred to as the plaintiff, against the Newton Engineering Company, hereinafter referred to as the defendant. There were certain parties brought in as garnishees who are not involved here. // The plaintiff filed a declaration and an affidavit of claim, and the defendant filed a plea of the general issue and also a special plea, supported by an affidavit, but no affidavit of merits was filed. On motion, later made by the defendants, an order was entered, giving it leave to withdraw its special plea. Later the court, on motion of the plaintiff, ordered the plea of the general issue stricken for want of an affidavit of merits and entered a default against the defendant for want of a plea, following which, the plaintiff's damages were assessed at \$442.48, and judgment was entered against the defendant for that amount. At a subsequent term, the defendant made a motion to vacate the judgment, which motion, the court denied, and the defendant has appealed from that order. //

400 - 12745

UNION PACIFIC RAILROAD COMPANY
v.
J. J. ...

INVESTMENT COMPANY
v.
J. J. ...

UNION PACIFIC RAILROAD COMPANY
v.
J. J. ...

1911 A. I. 494

MR. JUSTICE THOMAS delivered the opinion of the

court.

THIS was a suit in attachment brought by the
 Western Engineering Company, Incorporated, against the
 plaintiff, against the Western Engineering Company,
 Incorporated, recovered to as the defendant. There were
 certain parties brought in as intervenors who are not
 involved here. The plaintiff filed a declaration and
 on affidavit of debt, and the defendant filed a plea
 of the general issue and also a special plea, supported
 by an affidavit, for an affidavit of debt and filed.
 On motion, leave was given by the court, on order was
 entered, giving it leave to withdraw its special plea.
 Then the court, on motion of the plaintiff, ordered the
 plea of the general issue withdrawn for want of an affidavit
 of debt and entered a default against the defendant for
 want of a plea, following which, the plaintiff's demand
 was assessed at \$444.42, and judgment was entered against
 the defendant for that amount. At a subsequent term, the
 defendant made a motion to vacate the judgment, which motion
 the court denied, and the defendant has appealed from that

order.

After the expiration of the term at which the judgment in question was entered, the court was without any jurisdiction to entertain any motion to vacate it, unless made under the provisions of Section 89 of Chapter 110 of our statutes. The motion to vacate made by the defendant was oral, so far as the record discloses, and therefore, it did not comply with that section which requires the motion there provided for, to be in writing. Barnes v. Chicago City Railway Company, 185 Ill. App. 143; Holence v. Holence, #23437 Ill. App. Court First Dist. opinion filed April 18, 1918.

The trial court was, therefore, without any power to consider the motion, and the action of the court in overruling it, cannot be considered erroneous without regard to the reasons urged by the defendant in support of the motion.

It might further be said that even though the motion had been in writing, the trial court could not have properly allowed it. The defendant contends that it should have been allowed (1) because the case had not been regularly reached for trial, as it was not ^{on} a proper court calendar duly prepared according to law and (2) that it was improper to enter default and judgment without first striking the plea of the general issue from the files after proper notice to the defendant or its attorneys. The question of whether or not the case had been properly placed upon a printed calendar, and whether or not the action of the court was taken at a time the case had been regularly reached for trial, is immaterial, for the record shows that the defendant was in default. On the defendant's own motion,

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and satisfaction in accordance with what was expected of it, and

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it had been given leave to withdraw its special plea which, of course, included the affidavit of verification filed with it. That affidavit was not an affidavit of merits and did not purport to be. After the allowing of that motion, that plea was out of the case, whether or not they had ever been physically withdrawn from the files. This left the plea of the general issue without any affidavit of merits, and in view of the fact that the plaintiff had filed an affidavit of claim with its declaration, and the time for the defendant to plead had expired, the defendant was in default. Chicago Stamping Co. v. Mechanical Rubber Co. 83 Ill. App. 230. In that state of the record, the plaintiff was entitled to judgment at any time. While it is usual for the court to enter an order striking the plea from the files, in such a situation as the one presented here, such an order is not necessary, as advantage of the omission to file the affidavit of merits may be taken by motion for judgment as in case of default under the provisions of Section 55 of the Practice Act. Cramer v. Commercial Men's Association, 260 Ill. 516. It, however, appears from the record in this case that the trial court entered an order, striking the plea of the general issue from the files for want of an affidavit of merits, following which, default was entered for want of a plea. Inasmuch as the defendant was in default for want of an affidavit of merits, the plaintiff was entitled to have his formal order of default entered, and judgment awarded under the provisions of Section 55 of the Practice Act without any notice to the defendant. Cramer v. Commercial Men's

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 which, at present, included the following in position
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 almost any relative of matter, and in view of the
 fact that the plaintiff had filed an affidavit in
 which with the declaration, and the time for the
 defendant to plead had expired, the defendant was in
 default. James Thompson vs. James Thompson
 No. 11, 1901. The defendant was not in the record.
 The plaintiff was entitled of judgment of the court.
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 of matter, the plaintiff was entitled to have the record
 open to make record, and judgment entered about the
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 made in the defendant. James A. Thompson vs. James Thompson

Association, supra at page 521.

For these reasons, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

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439 - 23784

WILLIAM R. WILEY,

Appellant,

vs.

CHILDS COMPANY, a corp.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 496

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action brought by William R. Wiley, the plaintiff, against the Childs Company, the defendant, wherein the plaintiff sought to recover the sum of thirty dollars as the fair and reasonable value of his overcoat, which was stolen or lost in the restaurant of the defendant. At the close of the evidence, the trial court instructed the jury to return a verdict in favor of the defendant, following which, judgment was entered against the plaintiff, from which he has appealed.

On the day in question, the plaintiff entered the defendant's restaurant, where he had been in the habit of getting his luncheon for some time. He hung his hat and coat on a hook on the wall and sat down at a neighboring table, and ordered his luncheon. When ready to leave, he went to get his overcoat, and it was gone. He called the matter to the attention of the cashier, and he rapped on a bell, and some moments later, the manager of the restaurant appeared. An effort was made to find the coat, but it was unsuccessful. All

the menu cards for that day had been destroyed, but the testimony showed that there had always been printed on these cards, the words "not responsible for personal property unless checked by the cashier." The evidence further showed that there were two signs, one on each of the side walls of the restaurant room, permanently built into the walls, and approximately 14 X 24 inches in size, reading "not responsible for personal property unless checked by the management." The plaintiff testified that he never noticed the wording referred to on the menu cards, nor the signs on the walls. The evidence further showed that facilities were provided for checking overcoats and other personal property, consisting of brass checks and straps which were at the cashier's desk, and that any patron wishing overcoats or other articles checked, could have that service without charge.

The plaintiff seeks to recover on the theory that the loss of his overcoat was occasioned through the defendant's negligence. He does not allege a bailment in his statement of claim, and the facts referred to would not establish a bailment. Montgomery v. Ladging, 61 N. Y. S. 840; Patterson v. Hammerstein, 39 N. Y. S. 1039. However, the plaintiff contends that the fact that the defendant had the notices referred to, on the walls of the restaurant and printed on the menu cards, is immaterial, unless the plaintiff had knowledge of them citing Vogelaang v. Fredekin, 133 Ill. App. 361; La Salle Restaurant and Opera House v. McMasters, 85 Ill. App. 877. These cases are not in point, for, in these cases, there was evidence

tending to establish a bailment, for the garments involved were turned over by their owners to the restaurant employes, and the court held that certain notices, reading: "Not responsible for hats, coats or umbrellas" could be of no avail unless it were shown that the patron knew of them. It may be true that such notices would not relieve a restaurant keeper of the legal consequences of an actual bailment, unless it were shown that the bailor knew of them. But where the facts do not establish a bailment, as in this case, the presence of these notices, is material, on the question of the alleged negligence of the defendant in managing or conducting its restaurant. The burden of proof on the question of the defendant's negligence was upon the plaintiff, and it seems clear that the facts shown by the evidence as stated above, failed to make out any case of negligence on the part of the defendant. The presence of hooks along the wall may be construed as an invitation to the patron to hang his hat and coat there, if he wished to retain custody of it. The presence of the notices in question on the menu cards and on the walls was reasonably sufficient notice to patrons that other facilities for the keeping of such garments were available, and, if a patron wished to deposit his overcoat in the exclusive possession of the defendant and thus establish a bailment, he should have availed himself of the accommodations which the defendant provided for that purpose. In this case, he did not do so, and in our opinion, the evidence shows that the defendant was not guilty of negligence as alleged, in the management and

[illegible]

general supervision exercised by its employes over the restaurant in the matter of protection of the property of its patrons. Montgomery v. Ladging, *supra*; Harris v. Childs Unique Dairy Co., 84 N. Y. S. 260; Duckworth v. Codington, 136 N. Y. S. 69; Wentworth v. Riggs, 143 N.Y.S. 955; Scheef v. Food Craft Co., 165 N.Y.S. 209; Gibson v. Pennsylvania R. Co. 92 At. 59; Simpson v. Rourke, 34 N.Y.S. 11.

A number of cases have been called to our attention by the plaintiff which we think are not in point, for they involve such special circumstances as constitute a bailment. For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

151 - 24070

LEON A. BEREZNIAK,
Appellee,

vs.

BEAUREGARD F. MOSMERY and
IDLEWOOD HOTEL AND INVESTMENT
COMPANY, a corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 497

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court against the defendants for the sum of \$150, and the defendants bring the case here by appeal for review.

The claim of plaintiff is based upon allegations in the statement of claim wherein it is stated that plaintiff had been employed by defendants as attorney. There is some conflict in the evidence, but we are inclined to the view that there is sufficient evidence in the record to sustain the judgment of the trial court. In any event, the appeal must be dismissed.

On page 2 of the abstract of record the following appears:

"Appeal prayed and allowed, First District of Illinois. Bond \$250; bill of exceptions sixty (60) days."

The order allowing the appeal as it appears in the transcript of record is as follows:

"Now comes the plaintiff and prays that appeal in this case be granted to the Appellate Court for the First District of Illinois, which appeal is granted on condition that said party file herein an appeal bond conditioned according to law in the sum of \$250, with security to be approved by a judge of this court within 20 days from this date."

The appeal bond, which was filed December 1, 1917, was signed by the defendants. The record before us shows that the defendants did not pray for, and were not al-

JAMES A. MURPHY, JR.
Appellee.

COURT OF CHICAGO
JAMES A. MURPHY, JR.

REPRESENTED BY COUNSEL AND
IDLEWOOD HOTEL AND RESTAURANT
COMPANY, a corporation,
Appellants.

151 - 24070

THE PRESIDING JUDGE'S ORDER

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal
Court against the defendants for the sum of \$150, and the
defendants bring the case here by appeal for review.
The claim of plaintiff is based upon allegations
in the statement of claim wherein it is stated that plaintiff
had been employed by defendants as attorney. There is some
conflict in the evidence, but we are inclined to the view
that there is sufficient evidence in the record to sustain
the judgment of the trial court. In any event, the appeal
must be dismissed.

On page 2 of the abstract of record the follow-

ing appears:

"Appeal prayed and allowed, First District of Illinois.
Bond \$250; bill of exceptions sixty (60) days."

The order allowing the appeal as it appears in

the abstract of record is as follows:

"Now comes the plaintiff and prays that appeal in this
case be granted to the Appellate Court for the First Dis-
trict of Illinois, which appeal is granted on condition
that said party file herein an appeal bond conditioned
according to law in the sum of \$250, with security to be
approved by a judge of this court within 30 days from
this date."

The appeal bond, which was filed December 1,

1917, was signed by the defendants. The record before us

shows that the defendants did not pay for, and were not in-

lowed, an appeal to this court. The transcript of record shows that an appeal prayed for by plaintiff was allowed. Plaintiff did not perfect an appeal, and none was prayed for or allowed to the defendants.

The appeal of the defendants must be dismissed.

APPEAL DISMISSED.

THE COURT OF APPEALS, NEW YORK, has affirmed the judgment of the Supreme Court, and has ordered that the writ of habeas corpus be granted to the applicant.

MARK LEVY and ARTHUR LEVY,
Appellees,

vs.

ALBERT C. BARLEY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

211 I.A. 498

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court in favor of plaintiffs for the sum of \$2,339.81. The action was brought on a bond under which the defendant bound himself to pay the plaintiffs the penal sum of \$3,000; the condition of the bond is as follows:

"That whereas said Albert C. Barley has this day sold to Mark Levy and Arthur G. Levy, two (2) One Thousand Dollar (\$1,000.00) Gold Bonds of the Kansas City Oil Company of Kansas City, Kansas, with twelve (12) interest coupons attached to each other for thirty dollars (\$30.00) each, payable semi-annually on July 2nd and January 2nd each year, and said Albert C. Barley has and herewith guarantees the payment of the principal and interest on said bonds, as they severally mature, and should the Company default in payment of said interest at any time, said Albert C. Barley agrees to pay same within ten days from date of said default to Mark Levy and Arthur G. Levy, their heirs and assigns, and

Further should a default in interest payments result in a foreclosure of the mortgage securing said bonds, and the property of the Company be sold at a price that will net less than par for the above mentioned bonds, and accrued interest, then said Albert C. Barley is held and firmly bound to pay to Mark Levy & Arthur G. Levy, their heirs and assigns, on demand the amount of said deficiency together with any costs and attorneys fees there may be incurred in collection of said balance due, or in the collection of either the principal or interest on said bonds."

The evidence introduced on the trial shows that the bonds referred to in the above instrument matured January 2, 1917, and their payment was secured by a trust deed given to the Metropolitan Trust & Savings Bank as trustee. It was provided in this trust deed that if the Kansas City Oil Company failed to pay any interest on the bonds when due and pay-

MARK LEVY and ARTHUR G. LEVY,
Attorneys.

vs.

ALBERT C. BARTLEY,
Appellant.

2111 A. 438

IN THE DISTRICT COURT OF THE CITY OF KANSAS

DOCKETED THE 10TH DAY OF JULY, 1917.

This is an appeal from a judgment of the District

Court in favor of plaintiff for the sum of \$2,339.41. The

action was brought on a bond under which the defendant bound

himself to pay the plaintiff the penal sum of \$5,000; the

condition of the bond is as follows:

"That whereas said Albert C. Bartley has this day
sold to Mark Levy and Arthur G. Levy, two (2) One Thousand
Dollar (\$1,000.00) Gold Bonds of the Kansas City Oil Com-
pany of Kansas City, Kansas, with twelve (12) interest
coupons attached to each other for thirty dollars (\$30.00)
each, payable semi-annually on July and January and
each year, and said Albert C. Bartley has and hereafter
Guarantees the payment of the principal and interest on
said bonds, as they severally mature, and should the said
said defendant in payment of said interest at any time, said
Albert C. Bartley agrees to pay same within ten days from
date of said default to Mark Levy and Arthur G. Levy,
their heirs and assigns, and

Further should a default in interest payments re-
sult in a foreclosure of the mortgage securing said bonds,
and the property of the Company be sold at a price that
will not less than pay for the above mentioned bonds, and
accrued interest, then said Albert C. Bartley is said and
firmly bound to pay to Mark Levy & Arthur G. Levy, their
heirs and assigns, on demand the amount of said delinquency
together with any costs and attorneys fees there may be in-
curred in collection of said balance due, or in the collec-
tion of either the principal or interest on said bonds."

The evidence introduced on the trial shows that

the bonds referred to in the above instrument executed January

2, 1917, and their payment was secured by a trust deed given

to the Republican Trust & Savings Bank as trustee. It was

provided in this trust deed that if the Kansas City Oil Com-

pany failed to pay any interest on the bonds when due and pay-

able and such interest remained unpaid for 30 days, then the bonds should become due and payable and the trustee, when requested in writing, after notice in writing, should proceed to foreclose the trust deed.

The Kansas City Oil Company failed to pay interest on two bonds on July 2, 1911, and January 2 and July 2, 1912. The defendant paid these installments with interest to the plaintiffs. The Kansas City Oil Company went into bankruptcy some time prior to July, 1912, and the plaintiffs filed the two bonds in question as a claim in the bankruptcy proceedings. The bonds were for \$1,000 each, and at the time suit was brought \$125 had been paid on account of the principal of both bonds.

The contention is that in construing a contract of guaranty the intention of the parties will control and the undertaking as against a guarantor will not be extended beyond the terms of the guarantee. In the instrument sued upon the defendant expressly guarantees "the payment of the principal and interest on the said bonds as they severally mature." The bonds and trust deed, which was executed to secure their payment, appear to be but a single transaction, and in determining the liability of defendant upon his guarantee these instruments should be read together.

Kraft v. Hora, 159 Ill. App. 303.

"The time of payment as fixed in the note may be controlled by a separate written agreement made at the time of the execution of the note." Hunter v. Clarke, 184 Ill. 158.

The obligation of the defendant was to pay the bonds and the interest becoming due thereon at maturity, and the date of maturity is not necessarily the date specified in the bonds themselves. It may be, and we think in this case that recourse should be had, in determining the date of maturity, to the trust deed. This instrument provides that

and even interest received would for 30 days, then the bonds should become due and payable and the trustee, upon request in writing after notice in writing, should proceed to foreclose the trust deed.

The second City Oil Company failed to pay in-

terest on the bonds on July 1, 1911, and January 1 and July 1, 1912. The defendant paid these installments with in-

terest to the plaintiff. The second City Oil Company went into bankruptcy some time prior to July, 1911, and the plaintiff filed the two bonds in question as a claim in the

bankruptcy proceedings. The bonds were for \$1,000 each, and at the time suit was brought \$125 had been paid on ac-

coun of the principal of both bonds.

The contention is that in construing a con-

tract of guaranty the intention of the parties will con-

trol and the undertaking as against a guarantor will not

be extended beyond the terms of the guarantee. In the in-

strument upon which the defendant expressly guarantees "the

payment of the principal and interest on the said bonds as

they severally mature." The bonds and trust deed, which was

executed to secure their payment, appear to be but a single

instrument, and in determining the liability of defendant

upon his guarantee these instruments should be read together.

First v. Second, 152 Ill. App. 312.

"The time of payment as fixed in the note may

be controlled by a separate written instrument made at

the time of the execution of the note." Bank v.

Chicago, 104 Ill. 182.

The collection of the bonds was on pay and

bonds and the interest bearing the date of maturity, and

the date of maturity is not necessarily the date specified

in the bonds themselves. It may be, and we think in this

case that recourse should be had, in determining the date of

maturity, to the trust deed. This instrument provides that

if the maker of the bonds "shall fail or refuse to pay the said bonds or any of them or any installment of interest thereon when due and payable upon presentation at the office of the Metropolitan Trust & Savings Bank of Chicago, in the State of Illinois, and the same shall remain unpaid for a period of thirty days, then all of the bonds secured by this deed of trust shall become due and payable."

The contention is that the action by the plaintiff was prematurely brought. We do not agree with this contention. The evidence shows that interest was due and unpaid on the bonds at the time the action was brought, although the principal of the bond did not become due for some time thereafter. Under the trust deed the failure to pay interest for a period of 30 days caused the maturing of the bond.

It is insisted by defendant that if the date of maturity of the bonds be accelerated by the bankruptcy proceedings or by default in the payment of interest, he, the defendant, would be required to pay interest on \$2,000 until January 2, 1917. We do not think there is merit in this contention. If the bonds matured under the terms of the trust deed, or by bankruptcy action, and plaintiffs were paid the amount due them by way of principal and interest on these matured bonds, it is difficult to see how the defendant would be required to make payment "of interest after the principal had been paid." It was the right of the plaintiffs to enforce payment of the bonds and interest due thereon at maturity, that is, when the bonds matured under the terms of the contract between the maker of the bonds and the holder thereof.

We think there is some force in the contention of counsel for plaintiff that Section 16 of the Bankruptcy Act was intended in the interest of creditors to prevent a co-debtor or guarantor from escaping liability in a contract

if the maker of the bonds shall fail or refuse to pay the said bonds or any of them or any installment of interest thereon when the same shall be presented at the office of the National Trust & Savings Bank of Chicago, in the State of Illinois, and the same shall remain unpaid for a period of thirty days, then all of the bonds secured by this deed of trust shall become due and payable."

The contention is that the action by the plain-

tiff was prematurely brought. We do not agree with this contention. The evidence shows that interest was due and unpaid on the bonds at the time the action was brought, although the principal of the bond did not become due for some time thereafter. Under the trust deed the failure to pay interest for a period of 30 days caused the maturity of the bond.

It is insisted by defendant that at the date of

maturity of the bonds he accelerated by the bankruptcy proceedings or by default in the payment of interest, he, the defendant, would be required to pay interest on \$2,000 until January 2, 1917. We do not think there is merit in this contention.

If the bonds matured under the terms of the trust deed, or by bankruptcy action, and plaintiffs were paid the amount due them by way of principal and interest on these matured bonds, it is difficult to see how the defendant would be required to make payment of interest after the principal had been paid. It was the right of the plaintiff to require payment of the bonds and interest and interest at maturity, that is, when the bonds matured under the terms of the contract between the maker of the bonds and the holder thereof.

We think there is some force in the contention of counsel for plaintiff that section 15 of the Bankruptcy Act was intended in the interest of creditors to prevent a debtor or guarantor from escaping liability in a contract

by reason of the bankruptcy of a debtor.

We do not think the court erred in its refusal to strike out certain answers of a witness, one of the plaintiff's, who testified; this testimony was admitted without objection. The motion was "to strike out the answers of the witness." Counsel for defendant say that the witness testified to a conclusion. Even if it be conceded that counsel is correct, we think it was his duty to point out to the trial Judge the grounds upon which the motion to strike was based. 12 Ency. of Evidence, 205; Chicago & Eastern Ill. R. R. Co. v. Wallace, 202 Ill. 129.

If we are correct in our conclusion that the action herein was not prematurely brought, then the judgment in favor of plaintiffs is not excessive. The contract sued upon provided for the payment of interest until the bonds matured. At the time suit was brought \$125 had been paid on account of the principal of both bonds. Interest was allowed on the balance down to the date of the judgment. The bankruptcy of the maker of the bonds and the failure to meet the interest payments ipso facto rendered the defendant liable to plaintiffs on his bond, and under this bond he agreed to pay the principal as well as the interest when due. The refusal to hold defendant's proposition of law No. 6 was not error. With reference to other claimed errors, we do not think such errors if committed should cause a reversal of the judgment.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

by reason of the bankruptcy of a debtor.
We do not think the court erred in the refusal

to strike out certain answers of a witness, one of the
plaintiff's, who testified; this testimony was admitted
without objection. The motion was to strike out the an-
swers of the witness. Counsel for defendant say that the
witness testified to a declaration, even if it be conceded
that counsel is correct, we think it was his duty to point
out to the jury that the answers upon which the motion to

strike was based. In re, W. J. Wilson, 80; W. J. Wilson &

W. J. Wilson, 81; W. J. Wilson, 82; W. J. Wilson, 83.

If we are correct in our conclusion that the

action herein was not prematurely brought, then the judg-
ment in favor of plaintiff is not excessive. The question
arises upon provided for the payment of interest until the

bonds matured. At the time suit was brought \$100 had been
paid on account of the principal of both bonds. Interest was
allowed on the balance due to the date of the judgment. The
bankruptcy of the maker of the bonds and the failure to meet
the interest payments ipso facto rendered the defendant liable

to plaintiff on his bond, and under his bond he agreed to
pay the principal as well as the interest on the bond. The re-

fusal to hold defendant's obligation of law is, it was not
error, then reference to other similar errors, we do not

think such errors if committed should cause a reversal of
the judgment.

The judgment of the circuit court is affirmed.

APPROVED.

219 - 24144

JACOB GOTTLIEB,
Appellee,

vs.

ANDREWS & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 499

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed by plaintiff it was alleged in substance that the defendant was indebted to plaintiff in the sum of \$155; that plaintiff in the year 1916, being under the age of 21 years, entered into three contracts with the defendant under which plaintiff agreed to purchase certain shares of corporation stock; that plaintiff paid to defendant the sum of \$155 on said agreements; that plaintiff became of age on October 6, 1916, and that he thereafter disaffirmed the said agreements and demanded the return of the \$155 paid by him to defendant. The trial court entered judgment in favor of the plaintiff for the amount claimed and the defendant brings the case here by appeal for review.

It is contended by defendant that plaintiff failed to introduce any evidence of the purchase of the stock in question during his minority or of his disaffirmance of the contract within a reasonable time after he became of age. The plaintiff filed an affidavit in support of his statement of claim, and it does not appear that the defendant filed any affidavit denying the allegations of the statement of claim, or in support of any defense to the action.

A part of Section 55, chap. 110, R. S. of Illinois is as follows:

210 - 21144

JACOB GOTTLEB, Appellee.

APPEAL FROM FEDERAL COURT OF CHICAGO.

vs. ARTHUR S. GORDON, a corporation, Appellant.

211 I.A. 409

NO. 10,000,000

UNIVERSITY OF CHICAGO

In a statement of claim filed by plaintiff it was alleged in substance that the defendant was indebted to plaintiff in the sum of \$150; that plaintiff in the year 1916, being under the age of 21 years, entered into three contracts with the defendant under which plaintiff agreed to purchase certain shares of corporation stock; that plaintiff was to deliver the sum of \$150 on said agreement; that plaintiff became of age on October 6, 1916, and that he thereafter disaffirmed the said agreements and demanded the return of the \$150 paid by him to defendant. The trial court entered judgment in favor of the plaintiff for the amount claimed and the defendant brings the case here by appeal for review.

It is contended by defendant that plaintiff failed to introduce any evidence of the purchase of the stock in question within his minority or of his disaffirmance of the contract within a reasonable time after he became of age. The plaintiff filed an affidavit in support of his statement of claim, and it does not appear that the defendant filed any affidavit denying the allegations of the statement of claim, or in support of any defense to the action.

A part of Section 66, Chap. 110, R. S. of this-

note is as follows:

"If the plaintiff in any suit upon contract express or implied for payment of money shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant * * * he shall be entitled to judgment as in cases of default, unless the defendant or his agent or attorney shall file with his plea an affidavit, etc."

Under this statute plaintiff was entitled to a judgment, and we do not think this right was waived by the introduction of evidence in support of the statement of claim.

The contention that the rules of the Municipal court would not permit a default, may have been the reason why plaintiff introduced evidence on the trial of the cause, but whether this be so or not, the rules of that court are not before us. The rules of the Municipal court are not preserved in the record by bill of exceptions or otherwise, and they do not appear to have been introduced in evidence. This court will not take judicial notice of these rules. Lanigan v. J. C. Henderson & Co., 186 Ill. App. 569.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

"If the plaintiff is not able to produce evidence of injury for payment of money shall this court his obligation on affidavit showing the nature of his demand and the amount due him from the defendant? It will be entitled to judgment in its case of default. unless the defendant or his agent or attorney shall file with his plea an affidavit, etc."

Under this statute plaintiff was entitled to a judgment, and we do not think this right was waived by the introduction of evidence in support of the statement of claim. The contention that the rules of the municipal court would not permit a default, may have been the reason why plaintiff introduced evidence on the trial of the case, but whether this be so or not, the rules of that court are not before us. The rules of the municipal court are not preserved in the record by bill of exceptions or otherwise, and they are not known to have been introduced in evidence. This court will not take judicial notice of these rules. Carlin v. City of Houston, 20 Tex. 111, 49 Tex. 509.

The statement of the municipal court will be affirmed.

ATTEST.

DISTRIBUTORS COAL COMPANY,
a corporation,
Appellee,

vs.

CHARLES O. RACE and AMBROSIA
Y. RACE,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 501

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

Charles O. Race and Ambrosia Y. Race, defendants, on June 27, 1917, executed two promissory notes, one for the sum of \$1,694.44 and one for \$3,134.02, payable 100 days after date to the order of Distributors Coal Company, the plaintiff. The notes were endorsed to Taylor Coal Company and on June 29, 1917, a judgment by confession was entered thereon in favor of Taylor Coal Company; this judgment was paid in full.

The evidence introduced on the trial shows that April 30, 1917, the plaintiff delivered 71,300 pounds of coal to the Race apartments. Through error this coal was billed at 41,300 pounds instead of 71,300 pounds, the amount actually delivered. Mr. Frisby, plaintiff's general manager, testified that the notes referred to were delivered to him and that at the time of such delivery he had no knowledge that a mistake had been made in billing the coal. At the time the notes were delivered the plaintiff and defendants had arrived at a settlement of the balance due the plaintiff. This error was discovered after June 1st and from the testimony of Frisby the court was authorized in finding that the error was unknown to him at the time the notes were delivered. At the time the notes were delivered the account between plaintiff and de-

DISTRIBUTORS COAL COMPANY,
a corporation,
Appellee,

vs.

CHARLES C. RACE and AMBROSIA
Y. RACE,
Appellants.

ALLIED TRADING COMPANY
COURT OF CHICAGO.

211 I.A. 501

MR. PRESIDING JUSTICE OWEN
DELIVERED THE OPINION OF THE COURT.

Charles C. Race and Ambrosia Y. Race, defend-
ants, on June 27, 1917, executed two promissory notes, one
for the sum of \$1,694.44 and one for \$3,134.02, payable 100
days after date to the order of Distributors Coal Company,
the plaintiff. The notes were endorsed to Taylor Coal Com-
pany and on June 29, 1917, a judgment by confession was en-
tered therein in favor of Taylor Coal Company; this judgment
was paid in full.

The evidence introduced on the trial shows that
April 30, 1917, the plaintiff delivered 71,300 pounds of coal
to the race apartments. Through error this coal was billed at
41,300 pounds instead of 71,300 pounds, the amount actually
delivered. Mr. Frisby, plaintiff's general manager, testi-
fied that the notes referred to were delivered to him and
that at the time of such delivery he had no knowledge that a
mistake had been made in billing the coal. At the time the
notes were delivered the plaintiff and defendants had arrived
at a settlement of the balance due the plaintiff. This error
was discovered after June 1st and from the testimony of Frisby
the court was authorized in finding that the error was un-
known to him at the time the notes were delivered. At the time
the notes were delivered the account between plaintiff and de-

fendant was not in dispute. A balance was due at that time to plaintiff and the notes given incorrectly stated the amount of this balance.

It is generally true, as contended, that where a party without fault or fraud of an adverse party takes judgment for a sum less than is actually claimed, he is estopped to bring his second action for any balance due him before the entry of judgment. The authorities cited by counsel for defendant fully sustain this contention. The distinction, however, between the cases cited and the instant case is that the record does not disclose that the party plaintiff here has taken any judgment in its favor against the defendants. The notes in question were endorsed to Taylor Coal Company, which entered judgment thereon.

It appears from the evidence that at the time the notes were delivered the parties to the transaction believed that the amounts stated therein represented the balance then due plaintiff on the account. Had plaintiff retained the notes and had judgment not been entered thereon, the error in computing the balance due could have been shown by parol. The judgment referred to was entered in favor of an endorsee of the notes. The plaintiff was not a party to this action, and we are inclined to the view that, as against it, the bringing of an action for the recovery of the amount due on the notes did not preclude plaintiff, in a separate action, from claiming the amount actually due it at the time the notes were delivered. Ditch v. Vollhardt, 82 Ill. 134.

In the case of Carvill v. Mirror Films, Inc., 165 N. Y. Suppl. 676, relied upon by defendants, the plaintiff's action was for unliquidated damages for the breach of a contract of employment, and the court held therein, correctly, we think, that a party cannot split a cause of action for a

amount was not in dispute. A balance was due at that time to plaintiff and the notes given incorrectly stated the amount of this balance.

It is generally true, as contended, that where

a party without fault or fraud of an adverse party takes judgment for a sum less than is actually claimed, he is supposed to bring his account action for any balance due him before the entry of judgment. The authorities cited by defendant for defendant fully sustain this contention. The distinction, however, between the cases cited and the instant case is that the record does not disclose that the party plaintiff here has taken any judgment in its favor against the defendant. The notes in question were entered to pay for coal company, which entered judgment in error.

It appears from the evidence that at the time the

notes were delivered the parties to the transaction believed that the amounts stated therein represented the balance then due plaintiff on the account. Had plaintiff received the notes and had judgment not been entered thereon, the error in recording the balance due could have been shown by parcel. The judgment referred to was entered in favor of an excess of the notes. The plaintiff was not a party to this action, and we are inclined to the view that, in granting it, the principle of an action for the recovery of the amount due on the notes did not preclude plaintiff, in a separate action, from obtaining the amount actually due it at the time the notes were delivered.

Hatch v. Vailhardt, 22 Ill. 134.

In the case of Gervill v. Mirror Film, Inc., 103 Ill. 2d 574, 274, called upon by defendant, the plaintiff's action was for undelivered shares for the price of a contract of assignment, and the court held therein, correctly, we think, that a party cannot split a cause of action for a

single breach of a contract and bring several actions thereon by assigning part of his claim. In the instant case the plaintiff, under the authorities, would have had the legal right, before judgment was entered, to have compelled a payment of the full amount due it notwithstanding its acceptance of the notes. Its acceptance of the notes, under the circumstances of the case, should be regarded as a partial payment only of the account due it. The plaintiff had legal title to the notes and its negotiation of them did not operate against it as though a judgment had been taken in its favor thereon. The endorsement of the notes to the Taylor Coal Company did not have the effect of extinguishing the indebtedness due plaintiff on the account.

It is also contended that the judgment against defendant Ambrosia Y. Race should be reversed. The defendant Charles O. Race testified that he was the owner of the Race Apartments, but notwithstanding this fact we think there was some evidence in the record tending to show that Ambrosia Y. Race was liable for the whole balance due the plaintiff; she signed the notes in question; she was made a party defendant to the proceedings and she did not deny joint liability under oath as provided by the statutes.

In Hamilton v. The Century Manufacturing Co.

180 Ill. App. 100, the court said:

"It has also been held that the defendant without filing a plea denying joint liability, may successfully claim such defense where it affirmatively appears from the evidence that no joint liability existed under the contract sued on. United Workmen v. Zuhlke, 129 Ill. 298; Powell Co. v. Finn, 198 Ill. 567; Heidemeir v. Hecht, 145 Ill. App. 116."

We do not think it can be said that it affirmatively appears from the record in this case that no joint liability existed under the contract sued on.

The judgment of the Municipal Court will be affirmed

AFFIRMED.

single person of a contract and bring several actions thereon by assignment part of his claim. In the instant case the plaintiff, under the authorities, would have had the legal right, before judgment was entered, to have compelled a payment of the full amount due it notwithstanding its acceptance of the notes. Its acceptance of the notes, under the circumstances of the case, would be regarded as a partial payment only of the account due it. The plaintiff had legal title to the notes and its negotiation of them did not operate against it as though a judgment had been taken in its favor thereon. The endorsement of the notes to the Taylor Coal Company did not have the effect of extinguishing the indebtedness due plaintiff on the account.

It is also contended that the judgment against defendant Ambrosia Y. Race should be reversed. The defendant and Charles O. Race testified that he was the owner of the Race Apartments, but notwithstanding this fact we think there was some evidence in the record tending to show that Ambrosia Y. Race was liable for the whole balance due the plaintiff; she signed the notes in question; she was made a party defendant in the proceedings and she did not deny joint liability under each as provided by the statutes.

In Hamilton v. The Century Manufacturing Co., 100 Ill. App. 100, the court said:

"It has also been held that the defendant who, on filing a plea denying joint liability, may successfully claim such defense where it affirmatively appears from the evidence that no joint liability existed under the contract sued on. United Traction v. Empire, 120 Ill. 298; Carroll Co. v. Vicks, 120 Ill. 507; Hamilton v. Race, 125 Ill. App. 118."

We do not think it can be said that it affirmatively appears from the record in this case that no joint liability existed under the contract sued on.

The judgment of the Appellate Court will be affirmed.

MARTIN Janci and STEFAN PALANSKY,
Appellees,

vs.

STEFAN, alias STEVE CERNY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

211 I.A. 502

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Martin Janci and Stefan Palansky filed a bill of complaint in the Circuit Court of Cook County against Steve Cerny and John Cerny, his brother, in which bill it was charged in substance that the four parties named had been engaged as partners in a wool pulling business, and that the defendant Steve Cerny had, by the wrongful use of certain partnership assets, secured profits in excess of \$5,000 for which he refused to account to complainants. Answers were filed to the bill and the cause was referred to a master in chancery who, in his report to the court, found that on April 5th, 1916, Janci and Steve Cerny entered into an agreement under which Janci contributed the sum of \$250 and Steve Cerny \$4.60, which money was used in buying six bags of wool which were deposited with the National Wool Company until December 8, 1916, when they were sold; that on August 1, 1916, the four parties named entered into a partnership agreement for the purpose of buying skins and "pulling wool"; that Janci contributed thereto \$1050, Palansky \$500, John Cerny \$500 and Steve Cerny \$51.77, making a total sum of \$2,101.77; that this money was used by the partnership in purchasing skins and wool; that under the partnership agreement Steve Cerny was to have charge of the business and the wool owned by the partnership was to stand in his name, and that the profits or losses of the business should be divided equally among the partners; that Janci, who had no experience in the work contemplated, was to continue at his work

MARTIN JACOB and STEVE GERTY, Defendants.

vs.

STEAM, alias STEVE GERTY, Plaintiff.

STATE OF NEW YORK

IN SENATE

1915

THE RECEIVING TRUSTEE

RECEIVED THE ORDER OF THE COURT.

Martin Jacob and Steve Gerty filed a bill

of complaint in the District Court of New County against
 Steve Gerty and John Gerty, his partner, in which bill it was
 charged in substance that the two parties named had been em-
 ployed as partners in a wool selling business, and that the
 defendant Steve Gerty had, by the wrongful use of certain part-
 nership assets, secured profits in excess of \$5,000 for which he
 refused to account to complainants. Answers were filed to the
 bill and the cause was referred to a master in chancery who, in
 his report to the court, found that on April 25, 1915, Jacob
 and Steve Gerty entered into an agreement under which Jacob
 contributed the sum of \$250 and Steve Gerty \$150, which money
 was used in buying six bags of wool which were deposited with
 the National Wool Company until December 1, 1915, when they
 were sold; that on August 1, 1915, the two parties named en-
 tered into a partnership agreement for the purpose of buying
 skins and "pulling wool"; that Jacob contributed thereto
 \$100, Gerty \$50, John Gerty \$50 and Steve Gerty \$1.77,
 making a total sum of \$201.77; that this money was used by
 the partnership in purchasing skins and wool; that under the
 partnership agreement Steve Gerty was to have a share of the
 business and the wool owned by the partnership was to stand in
 his name, and that the profits or losses of the business should
 be divided equally among the partners; that Jacob, and had no
 experience in the wool consignment, and to continue in the wool

as a machinist and that the other three parties were to work for the partnership at usual wages.

The master further found that Steve Cerny purchased certain skins for the sum of \$3,717.80; that for a return of these skins to the seller he received a credit of \$1,538.40 and also a credit of \$77.63 for pulling wool from "shearlings" belonging to the seller, leaving a balance due on account of \$2,101.77; that this balance was paid in cash, of which the defendant Steve Cerny contributed \$50.77; that the wool which was pulled from these skins was deposited with the National Wool Company and the warehouse receipts therefor were made out in the name of Steve Cerny.

The master also found that Steve Cerny, while the other three parties were engaged in the work of the partnership, entered into a contract with one John Svatik to act as his foreman in a wool pulling business, under which contract Cerny was to receive, in addition to the wages usually paid for such work, one-third of the profits of the business.

The evidence introduced before the master shows that Steve Cerny did not disclose his employment under this contract to his partner Janci; that he did say to Palansky, "We are going to work for John Svatik because he promised me a certain percent." Steve Cerny, Palansky and John Cerny thereafter worked about two months for Svatik. The master found, and the evidence shows, that about August 14, 1916, Steve Cerny turned over to Svatik two warehouse receipts for the wool deposited with the National Wool Company. Svatik then pledged these receipts to secure loans made to him of about \$2,000. A profit of \$182.88 was realized by the partnership from a sale of the wool purchased by Janci and Steve Cerny in August, 1916, and sold December 8, 1916, for which profits Cerny has accounted to his partners.

as a machinist and that the other three parties were to work for the partnership at usual wages.

The master further found that Steve Gery, pur-

chased certain skins for the sum of \$5,717.00; that for a return of these skins to the seller he received a credit of \$1,528.40 and also a credit of \$7.68 for pulling wool from "shearlings" belonging to the seller, leaving a balance due on account of \$2,101.77; that this balance was paid in cash, of which the defendant Steve Gery contributed \$50.77; that the wool which was pulled from these skins was deposited with the National Wool Company and the warehouse receipts therefor were made out in the name of Steve Gery.

The master also found that Steve Gery, while the

other three parties were engaged in the work of the partnership, entered into a contract with one John Gaskik to act as his foreman in a wool pulling business, under which contract Gery was to receive, in addition to the wages usually paid for such work, one-third of the profits of the business.

The evidence introduced before the master shows that Steve Gery did not disclose his employment under this contract to his partner Janki; that he did say to Janki, "I've got to work for John Gaskik because he promised me a certain percent."

Steve Gery, Janki and John Gaskik thereafter worked about two months for Janki. The master found, on the evidence shown, that about August 14, 1916,

Steve Gery turned over to Gaskik two warehouse receipts for the wool received from the National Wool Company. Gaskik then

induced these receipts to secure loans made to him of about \$2,000. A profit of \$10.68 was realized by the partnership from a sale of the wool purchased by Janki and Steve Gery in August, 1916, and said receipts, 8, 1916, for which profits

Gery has accounted to his partners.

Cerny realized a profit altogether of \$5,524.78 from his contract and transactions with John Svatik. While the evidence shows that he refused to account to his partners for all of these profits, it does appear that February 18, 1917, he paid Palansky the money advanced by Palansky to the partnership, together with his share of the profits on wool purchased in August, 1916; on March 21, 1917, he paid Janci on the same basis and in addition thereto he paid Janci \$151.20 and Palansky \$75.60, the latter two sums being the amounts allowed by him as their share of the profits accruing out of the use of the warehouse receipts by John Svatik.

The decree of the court is in all respects in accordance with the report and recommendations of the master. The defendant Steve Cerny brings the case here by appeal.

From the large volume of evidence heard by the master it is evident that the chief controversy between the parties is as to whether the partnership agreement between them was of a general or limited nature. The parties contradict each other in material ways, but from the whole evidence we think it perfectly clear that when the parties entered into business together they intended to invest their money and services in a general skin purchasing and wool pulling business.

The decree of the court provides for a dissolution of the partnership and for a distribution of the sum of \$5,524.78, which the evidence shows was received by Steve Cerny as the result of his transactions with John Svatik. There can be no doubt of the wrongful conduct of Steve Cerny in delivering the warehouse receipts which belonged to the partnership for the use and benefit of himself and Svatik; this was an unauthorized diversion of the partnership property, and the complainants have a clear legal right to a finding that the defendant, Steve Cerny, be required to

Corny realized a profit altogether of \$2,524.78

from the contract and transaction with John Avelik. While the evidence shows that he refused an account to his partners for all of those profits, it does appear that Corny is

1917, he paid to Avelik the money advanced by Avelik to the partnership, together with his share of the profits on wool purchased in August, 1916; on March 21, 1917, he paid Avelik

on the same basis and in addition thereto he paid Avelik \$101.80 and finally \$75.00, the latter two sums being the amounts allowed by him to Avelik's share of the profits according out of the use of the warehouse receipts by John Avelik. The record of the case is in all respects in accordance with the report and recommendations of the master.

The defendant Dave Corny prides the case here by appeal.

From the large volume of evidence heard by the master it is evident that the chief controversy between the parties is as to whether the partnership agreement between them was of a general or limited nature. The parties contend that each acted in several ways, but from the whole evidence

we think it perfectly clear that when the parties entered into business together they intended to invest their money and services in a general skin purchasing and wool pulling

business.

The decree of the court provides for a dissolution

of the partnership and for a distribution of the net of \$2,524.78, which the evidence shows was received by Dave Corny as the result of his transactions with John Avelik.

There can be no doubt of the wrongful conduct of Dave Corny in withholding the warehouse receipts which belonged to the partnership for the use and benefit of himself and Avelik;

this was an unauthorized diversion of the partnership property, and the complainants have a clear legal right to

a finding that the defendant, Dave Corny, be required to

account to them for the profits derived by him from the use of this property.

It is contended by the defendant, who brings the case here, that a material variance exists between the theory of complainant's case as shown by the bill, and the decree of the court. There is no merit in this contention. The theory of the bill is that the defendant had made a wrongful use of the partnership funds, from which he had derived profits, and the decree, as we understand it, proceeds on the theory that the transactions between Svatik and Steve Cerny were transactions of the partnership and were on behalf of and for its benefit. The decree as we read it does not find as a fact that the partnership had entered into any agreement with Svatik and Cerny. The language of this part of the decree, when read with the whole decree, leads us to the conclusion that the chancellor meant to hold that the defendant's conduct was such as to create a resulting trust in favor of the partnership. It is true that the decree did not specifically find that a resulting trust resulted from defendant's conduct, but we think that no other conclusion can be arrived at from a careful examination of the whole decree.

In Smith v. Smith, 85 Ill. 189, the Supreme court held that if the proofs in a case and the facts stated in a bill showed the existence of a resulting trust "that was sufficient without naming it a resulting trust."

The evidence does not show a supplemental agreement, as contended by defendant. The real nature of the transactions between him and Svatik were unknown to complainants. While it appears that Steve Cerny, Falansky and John Cerny were employed by Svatik, we think the evidence fails to show that this employment constituted a modification in any way of the partnership agreement. Cerny's duty in relation to his part-

account to take for the profits derived by him from the use of this property.

It is contended by the defendant, who brings the case here, that a material variance exists between the theory of complainant's case as shown by the bill, and the decree of the court. There is no merit in this contention.

The theory of the bill is that the defendant had made a wrongful use of the partnership funds, from which he had derived profits, and the decree, as we understand it, proceeds on the theory that the transactions between Gavitt and Gerny were transactions of the partnership and were on behalf of and for its benefit. The decree as we read it does not find as a fact that the partnership had entered into any agreement with Gavitt and Gerny. The language of this part of the decree, when read with the whole decree, leads us to the conclusion that the chancellor meant to hold that the defendant's conduct was such as to create a resulting trust in favor of the partnership. It is true that the decree did not specifically find that a resulting trust resulted from defendant's conduct, but we think that no other conclusion can be arrived at from a careful examination of the whole decree.

In Smith v. Smith, 85 Ill. 189, the supreme court held that if one partner in a case and the facts stated in a bill showed the existence of a resulting trust that was a sufficient element making it a resulting trust. The witness does not seem a supposition that he was an employee of defendant. The real issue of the transaction between him and Gavitt seems unknown to complainant. While it appears that Gavitt, Gerny and John Gerny were employed by Gavitt, we think the evidence fails to show that this defendant constituted a modification in any way of the partnership agreement. Gerny's duty in relation to his part-

ners was clearly to preserve the partnership assets and not to deal with them for his individual benefit without the consent of his partners. We think the evidence shows that his conduct was in the main secretive and that the profits he derived from his relations with Svatik were in the main due to his violation of a duty which he owed to his partners.

The decree does not, as urged, require the defendant to contribute the \$15 a week paid to him by Svatik subsequent to August, 1916. He received as profits from his venture with Svatik the sum of \$5,524.78 in addition to the \$15 per week paid to him. The acceptance on March 21, 1917, by Junci of \$151.20 and by Palansky of \$75.60 did not excuse defendant from accounting to complainants for the actual profits which he derived by his use of the assets of the partnership. Even if it be admitted that this money was, in form, paid in settlement of their claims against defendant, the evidence shows that they received the money without full knowledge of his wrongful use of the warehouse receipts. Phillips v. Reynolds, 236 Ill. 121.

The court did not err in taxing the costs of the proceedings against the defendant. There is sufficient evidence in the record to warrant the evident conclusion of the master that the defendant had placed the wool which was owned by the partnership at the disposal of John Svatik, and that this conduct was fraudulent as against the rights of complainants.

The decree of the Circuit court is affirmed.

AFFIRMED.

here was clearly to preserve the partnership assets and not to deal with them for his individual benefit without the consent of his partners. He claims the evidence shows that his conduct was in the main secretive and that the profits he derived from his transactions with Javitz were in the main due to his violation of a duty which he owed to his partners.

The decree does not, as alleged, require the defendant to contribute the \$15,000 to him by Javitz.

Subsequent to August, 1916, he received no profits from his partnership with Javitz and the sum of \$5,544.75 in addition to the \$15,000 was paid to him. The record shows on March 21, 1917, by check of \$15.00 and by delivery of \$5.00 did not exhaust defendant's account to Javitz for the account of the partnership which he derived by his use of the assets of the partnership. Even if it be admitted that this money was, in form, paid in settlement of their claims against defendant, the evidence shows that Javitz received the money without full knowledge of its beneficial use of the partnership receipts. Phillips v. Kevell, 238 Ill. 121.

The court did not err in taking the costs of the proceedings against the defendant. There is sufficient evidence in the record to warrant the evident conclusion of the master that the defendant had placed the wool which was owned by the partnership at the disposal of John Javitz, and that this conduct was fraudulent as against the rights of complainant. The decree of the Illinois court is affirmed.

REVEREND.

JOHN SEXTON & COMPANY,
a corporation,
Appellant.

vs.

ENGLISH CANNING AND MANUFACTURING
CO., a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 504

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court in favor of the defendant.

In the statement of claim filed in the trial court by plaintiff it was alleged that the defendant was indebted to it in the sum of \$260 as damages for the breach of a contract under the terms of which the defendant agreed to sell and deliver certain merchandise to plaintiff.

The defendant filed an affidavit of merits in which it set up its defense to the case made by plaintiff in its statement of claim. The caption of this affidavit is as follows:

| | | |
|--|-----|---------------------------------------|
| STATE OF ILLINOIS)
CITY OF CHICAGO)
First District) | ss. | In the Municipal Court of
Chicago. |
|--|-----|---------------------------------------|

| | |
|---|----------------------------|
| JOHN SEXTON & COMPANY,
a corporation
vs.
ENGLISH CANNING AND
MANUFACTURING COMPANY,
a corporation. |)
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|--|------|
| STATE OF ILLINOIS)
COUNTY OF COOK)
CITY OF CHICAGO) | ss." |
|--|------|

This affidavit was signed by Sam Benz as president of the defendant company, and the jurat thereto is as follows:

JOHN WATSON & COMPANY,
a corporation,
Appellants.

ROBERT CARPENTIER AND HENRIETTA CARPENTIER,
Defendants.

511 A. 504

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

APPEAL FROM THE JUDICIAL COUNCIL OF THE CITY OF CHICAGO.

This is an appeal from a judgment of the

Illinois Court of Appeals.

In the statement of facts filed in the trial

court by plaintiff it was alleged that the defendant was

induced to do so in the year of 1900 or thereabouts for the purpose

of a fraudulent and unlawful transaction.

In said statement certain particulars are stated.

The defendant filed an affidavit of facts in

which is set up in answer to the case made by plaintiff

in his statement of facts. The caption of this affidavit

is as follows:

STATE OF ILLINOIS,
COUNTY OF COOK,
City of Chicago.
vs.
JOHN WATSON & COMPANY,
a corporation.

JOHN WATSON & COMPANY,
a corporation,
vs.
ROBERT CARPENTIER AND HENRIETTA CARPENTIER,
a corporation.

STATE OF ILLINOIS,
COUNTY OF COOK,
City of Chicago.

This affidavit was signed by the defendant as president of the

defendant company, and the facts stated are as follows:

"Subscribed and sworn to before me this 1st day of November, A. D. 1917.

And I hereby certify that by virtue of the laws of Indiana, I am authorized to administer oaths.

John L. Luckett,

Notary Public.

My commission expires Oct. 25, 1921."

It is insisted that it appears that the affidavit of merits was sworn to in Cook County before a notary public of Indiana, who had no legal authority to administer oaths in Cook County, Illinois. The record before us does not disclose that the question presented here was raised at any time in the trial court. No bill of exceptions or stenographic report appears in the record, and we are unable, under the circumstances, to say that evidence was not introduced on the trial tending to prove that the affidavit in question was in fact sworn to in the State of Indiana. So far as we are apprized the plaintiff made no effort to present this question to the trial court, and if it be true that it went to trial upon the issues presented by the statement of claim and the alleged affidavit of merits, it must be held that it has waived its right to present the point for decision here. The case is a fourth-class case and hence no written pleadings are required. The case is to be regarded as whatever the evidence introduced makes it.

Edgerton v. Chicago, etc., 240 Ill. App. 311.

It may be conceded that the caption of the affidavit above set forth shows, prima facie, that the affidavit was not sworn to in the State of Indiana. We think, however, that if the point had been pressed in the trial court the defendant could have shown by proper evidence that the affidavit was in fact sworn to in Indiana. Whether such evidence was introduced on the trial cannot be determined from the record here. Van Dusen v. Lepple, 78 Ill. 645.

[illegible][illegible]

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It was suggested that the collection of the affidavits should have been taken before the affidavits were given to the State of Indiana. It is known, however, that if the affidavits had been presented in the State of Indiana, the affidavits could have shown by proper evidence that the affidavits are in fact correct in Indiana. Whether such evidence was introduced or not cannot be determined from the records here. See also the affidavits, 78 Ill. 645.

It is asserted by counsel for plaintiff that defendant was required under certain rules of the Municipal court to file an affidavit of merits to the claim of plaintiff. The rules relied upon by counsel are not contained in the record before us. So far as we can determine they were not introduced on the trial and we cannot take judicial notice of their contents. An additional transcript of record was filed here June 3, 1918. This additional record contains what purports to be copies of rules 18 and 19 of the Municipal court certified to by one of the Judges of that court. The certification of the Judge does not make the rules part of the record of this case.

In Lanigan v. Henderson & Co., 188 Ill. App. 569, it was held that an objection to an affidavit of merits on the grounds that it did not comply with rules of the Municipal court could not be urged on review, where the rules of that court were not preserved in the record.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

It is asserted by counsel for defendant that the

defendant was permitted under certain rules of the municipal court to file an affidavit of merits to the claim of plaintiff. The rules stated upon by counsel for defendant in the record before me, to the effect that defendant was not introduced on the trial and as a result the judicial notice of their contents. An additional transcript of record was filed here June 3, 1916. This additional record contains what purports to be copies of rules 12 and 13 of the municipal court certified to by one of the judges of that court. The certification of the judge does not state the rules part of the record of this case.

In Indy v. Indy, 100 Ind. 111, 100 Ind. 111, 100 Ind. 111.

It was held that an objection to an affidavit of merits on the ground that it did not comply with rules of the municipal court could not be raised on review, where the rules of that court were not preserved in the record.

The judgment of the municipal court will be affirmed.

Reversed.

APPEAL.

C. E. PRATT, doing business as
Logan Square Automobile Station,
Appellee,

vs.

INDIAN RIVER GARDEN CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 505

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of plaintiff for the sum of \$150.76 entered of record in that court on November 21, 1917.

Certified copies of the appeal bond in the record show that an appeal was taken by defendant from the judgment and not from the order overruling a motion to vacate the judgment entered in the cause on December 17th.

It is asserted in each of eight assignments of error appearing in the abstract of record that the court erred in refusing to vacate the judgment in question. An affidavit was filed in the cause upon which the motion to vacate was based. We have examined this affidavit and it is our opinion that the court did not abuse its discretion in disallowing the motion. In any event it appears ~~that~~ ^{that} in the order disallowing the motion the defendant was given 60 days within which to file a bill of exceptions. No bill of exceptions or stenographic report is included in the record, and we are not permitted to review the action of the trial Judge who overruled the motion to vacate; even if it be conceded that the defendant has perfected his appeal from the order in question, his failure to preserve for review, by bill of exceptions, the affidavit in support of the motion compels us to affirm the judgment of the Municipal court. The judgment is not void upon its face. Boyle v. Chytraus, 125 Ill. 370.

AFFIRMED.

C. E. PRATT, doing business as
Logan Square Automobile Station,
Appellee.

vs.

INDIAN RIVER GARDEN CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

2111.A.505

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court in favor of plaintiff for the sum of \$150.75 entered of record in that court on November 21, 1917.

Certified copies of the appeal bond in the record show that an appeal was taken by defendant from the judgment and not from the order overruling a motion to vacate the judgment entered in the cause on December 17th.

It is asserted in each of eight assignments of error appearing in the abstract of record that the court erred in refusing to vacate the judgment in question. An affidavit was filed in the cause upon which the motion to vacate was based. We have examined this affidavit and it is our opinion that the court did not abuse its discretion in disallowing the motion. In any event it appears wrong in the order dissolving the motion ^{that} the defendant was given 30 days within which to file a bill of exceptions. No bill of exceptions or stenographic report is included in the record, and we are not permitted to review the action of the trial judge who overruled the motion to vacate; even if it be conceded that the defendant has perfected his appeal from the order in question, his failure to preserve for review, by bill of exceptions, the affidavit in support of the motion compels us to affirm the judgment of the Municipal court. The judgment is not void upon its face. Dwyer v. Chytrus, 125 Ill. 570.

HYMAN SILVERMAN,
Appellee,

vs.

HARRY KORSHAK and ISAAC
LASHKOVITZ,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 506

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF
THE COURT.

This is an appeal from a judgment of the Municipal court against the defendant and in favor of the plaintiff for \$639.21.

In the statement of claim filed by plaintiff it appears that the claim of plaintiff is based upon a judgment note which it is alleged was executed by the defendant, I. Lashkovitz, made payable to the order of Harry Korshak and by him endorsed and delivered to plaintiff. An affidavit of merits was filed by defendants on August 4, 1917, which set up in substance that the defendant Korshak had delivered the note in question to the Lawndale Sash and Door Company; that the defendant Lashkovitz was merely an accommodation party to the note and that the Lawndale Sash and Door Company had full knowledge of this fact; that the Lawndale Sash and Door Company received the note from Korshak in payment of an indebtedness due it by him and that said Lawndale Sash and Door Company had agreed that the time for payment of the note would be extended from time to time for a period of two years; that the plaintiff did not receive the note by endorsement and delivery from Korshak and that plaintiff was not a bona fide holder thereof, and that suit was instituted in his name "in an endeavor to preclude the defendants therein from asserting the defense hereinabove set forth.

CHIEF OF POLICE
CITY OF CHICAGO

CHIEF OF POLICE
CITY OF CHICAGO

VS.

CHIEF OF POLICE
CITY OF CHICAGO

CHIEF OF POLICE
CITY OF CHICAGO

CHIEF OF POLICE
CITY OF CHICAGO

CHIEF OF POLICE

This is an appeal from a judgment of the court.

which court against the defendant and in favor of the plain-

tiff for \$639.21.

In the statement of claim filed by plaintiff it

appears that the claim of plaintiff is based upon a judgment

note which it is alleged was executed by the defendant, I.

Lashovitz, made payable to the order of Harry Korshak and

by him endorsed and delivered to plaintiff. An affidavit of

plaintiff was filed by defendant on August 4, 1917, which set

out in substance that the defendant Korshak had delivered the

note in question to the Lashovitz Cash and Note Company; that

the defendant Lashovitz was merely an accommodation party to

the note and that the Lashovitz Cash and Note Company had full

knowledge of this fact; that the Lashovitz Cash and Note Com-

pany received the note from Korshak in payment of an indebted-

ness due it by him and that said Lashovitz Cash and Note Com-

pany had entered into the law for payment of the note which

is extended from time to time for a period of two years; that

the plaintiff did not receive the note by endorsement and

delivery from Korshak and that plaintiff was not a bona fide

holder thereof, and that suit was instituted in his name "in

an endeavor to procure the defendant therein from asserting

the defense of non est.

On December 27, 1917, a jury found in favor of the plaintiff and judgment was entered in his favor against defendants for the sum of \$636.82. This verdict and judgment were vacated on January 4, 1918, and on January 9, 1918, an order was entered that "the affidavit of merits of defendants stand as a plea in abatement." On January 10, 1918, an order was entered of record in the cause, a part of which is as follows:

"This matter coming on again to be heard on the agreement of the parties that the affidavit of merits of the said defendants, Harry Korshak and Isaac Lashkovitz, heretofore filed, stands as an affidavit in support of a motion in the nature of a plea in abatement of the action, and not as an affidavit of merits to the action;

It is ordered that said affidavit of merits of Harry Korshak and Isaac Lashkovitz heretofore filed as aforesaid, stand as an affidavit in support of a motion in the nature of a plea of abatement to the action, and not as an affidavit of merits."

On motion of plaintiff the affidavit of merits or plea in abatement was stricken from the files, and it is insisted here that the court erred in so doing. The point raised by counsel is not before us. The plea in abatement or affidavit of merits, whatever the document may be called, was on motion of the trial court stricken from the files and it became thereby no longer a part of the record. The instrument is not preserved in a bill of exceptions.

In Witteaman Company v. Goeke, 200 Ill. App. 108, it was held that a ruling of the court striking a pleading from the files cannot be reviewed in a court of appeals unless the pleading and ruling thereon are preserved in a bill of exceptions. Town of Scott v. Artman, 237 Ill. 394. The pleading in question, which is set out in the abstract, is on its face an insufficient answer to the claim of plaintiff. It appears therein that Korshak, the defendant, delivered the note in question in payment of an indebtedness, and the

On December 27, 1917, a jury found in favor of the plaintiff and judgment was entered in his favor against defendant for the sum of \$666.81. This verdict and judgment were vacated on January 4, 1918, and on January 9, 1918, an order was entered that the affidavit of merits of defendant be filed. On January 10, 1918, an order was entered of record in the cause, a part of which is as follows:

"This matter coming on again to be heard on the answer of the parties that the affidavit of merits of the said defendant, Harry Gorman, and two witnesses, hereinafter filed, stands as an affidavit in support of a motion in the nature of a plea in abatement of the action, and not as an affidavit of merits to the action; it is ordered that said affidavit of merits of Harry Gorman and two witnesses heretofore filed as above said, stand as an affidavit in support of a motion in the nature of a plea in abatement of the action, and not as an affidavit of merits."

On motion of plaintiff the affidavit of merits or plea in abatement was stricken from the files, and it is in- stated here that the court erred in so doing. The point raised by counsel is not before us. The plea in abatement or affidavit of merits, whatever the document may be called, was on motion of the trial court stricken from the files and it became thereby no longer a part of the record. The instrument is not preserved in a bill of exceptions.

In Widdow Henry v. Gorman, 203 Ill. App. 148, it was held that a ruling of the court striking a pleading from the files cannot be reviewed in a court of appeals unless the pleading and ruling thereon are preserved in a bill of exceptions. Row of Scott v. Arthur, 203 Ill. 564. The pleading in question, which is set out in the abstract, is on its face an invariable answer to the claim of plaintiff. It appears therein that Gorman, the defendant, delivered the note in question in payment of an indebtedness, and the

promise to extend the payment of the note from time to time seems to be unsupported by any consideration.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

promise to extend the term of the note from time to time
seems to be warranted by my examination.

The judgment of the Landlord Court will be

affirmed.

WILLIAM.

317 - 24244

ABRAHAM LEFINE,
Appellee,

vs.

CHICAGO WASTE COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 507

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of the plaintiff and against the defendant for the sum of \$200.

The only point raised by the briefs of counsel is whether the trial court should have admitted certain evidence which it is claimed if admitted would have shown that plaintiff's claim was based upon an attempt on his part to represent, as attorney, conflicting and hostile interests.

Plaintiff, an attorney, testified that June 20, 1917, he called defendant company on the telephone, that he talked with Mr. Hofnauer, an officer of the company, that he told Hofnauer he had certain information that defendant was being robbed, which information he would give to him if he would call at plaintiff's office; that he, plaintiff, disclosed this information to Hofnauer and the source from which it came to plaintiff; that Hofnauer said he would investigate the matter and if it should develop that defendant was being robbed he would remunerate plaintiff for this information; that three days later Hofnauer called plaintiff on the telephone, saying to him, "Come over quick, we got the gang. I find we have been robbed of about \$15,000 in the past year. Two of the men are in the office now." In response to this call plaintiff went to defendant's office and he there ex-

CHICAGO NORTH BRANCH, A. J. 1937, he called defendant company on the telephone, that he talked with Mr. Hoffbauer, an officer of the company, and

CHICAGO NORTH BRANCH, A. J. 1937, he called defendant company on the telephone, that he talked with Mr. Hoffbauer, an officer of the company, and

214 - 1000

CHICAGO NORTH BRANCH, A. J. 1937, he called defendant company on the telephone, that he talked with Mr. Hoffbauer, an officer of the company, and

This is an appeal from a judgment of the Circuit Court in favor of the plaintiff and against the defendant for the sum of \$250.

The only issue raised by the writ of certiorari is whether the Circuit Court should have admitted certain evidence which is claimed to be admitted would have shown that plaintiff's claim was based upon an attempt to sell part to defendant, an attorney, solicitor, and real estate representative. The Circuit Court, finding that the defendant, an attorney, solicitor, and real estate representative, had called defendant company on the telephone, that he talked with Mr. Hoffbauer, an officer of the company, and that he had certain information that defendant was being robbed, which information he would give to him if he would call at plaintiff's office; that he, plaintiff, also closed this information to Hoffbauer and the source from which it came to plaintiff; that Hoffbauer would be would investigate the matter and it is shown that Hoffbauer was being robbed he would investigate plaintiff for this information; that Hoffbauer would call plaintiff on the telephone, saying to him, "Come over please, we are in trouble. I think we have been robbed of about \$15,000 in the past year. Two of the men are in the office now." In response to this call plaintiff went to defendant's office and he there ex-

amined two men who were in the office and later took them to the East Chicago Avenue police station, where he further examined them for the purpose of getting information relative to the alleged thefts from defendant. The evidence shows that plaintiff spent some further time and performed other services on the same day in an effort to discover the identity of the alleged thieves. On the following morning plaintiff and Hofnauer met at the East Chicago Avenue station and plaintiff prepared two "John Doe" warrants; he was present when one Goldstein was arrested and he and Hofnauer went to the place of business of a man named Richards, in the basement of which was found 10 bales of waste. Plaintiff testified that he was with Hofnauer and the police officers until 3 o'clock in the afternoon of that day; that Hofnauer appeared to be "cooling off a bit," and that plaintiff left him with the suggestion that if he was wanted he could be called at his office; that that was the last plaintiff had to do with the case except to appear as a witness before the grand jury.

There is a direct conflict between Hofnauer and plaintiff as to what was said by them at different times, with reference to the alleged employment of plaintiff as attorney for defendant. The evidence discloses that Lepine, an attorney, signed the complaints upon which warrants were issued for the arrest of persons charged with the alleged thefts, and Hofnauer says that Lepine said he did this so as to protect the defendant from liability for the arrests. The defendant offered to show by the testimony of a witness that plaintiff's appearance at defendant's office on the day preceding the issuance of the warrants was brought about by the request of one Feldman, who was in defendant's office at the time plaintiff was called upon the telephone. An objection

...two men who were in the office and later took them to the West Chicago Avenue Police Station, where he further examined them for the purpose of getting information relative to the alleged theft from defendant. The evidence shows that plaintiff spent some of his time and performed other services on the same day in an effort to discover the identity of the alleged thieves. On the following morning plaintiff and defendant met at the West Chicago Avenue Station and plaintiff prepared two "John Doe" warrants; he was present when one defendant was arrested and he and defendant went to the place of business of a man named Richards, in the basement of which was found 10 pairs of shoes. Plaintiff testified that he was with defendant and the police at least until 3 o'clock in the afternoon of that day; that defendant appeared to be "cooling off a bit" and that plaintiff left him with the suggestion that if he was wanted he could be called at his office; that that was the last plaintiff had to do with the case except to appear as a witness before the grand jury.

There is a direct conflict between defendant and plaintiff as to what was said by each at different times, with reference to the alleged employment of plaintiff as attorney for defendant. The evidence discloses that Lapine, an attorney, signed the complaints upon which warrants were issued for the arrest of persons charged with the alleged theft, and defendant says that Lapine said he did this so as to protect the defendant from liability for the arrests. The defendant offered to give by the testimony of a witness that plaintiff's appearance at defendant's office on the day preceding the issuance of the warrants was brought about by the request of one Lapine, and was in defendant's office at the time plaintiff was called upon the telephone. An objection

to this offer was sustained. We think this evidence should have been admitted.

It should be kept in mind that we are dealing here with the conduct of an attorney, an officer of the court. The contention is that Lepine's voluntary offer of information to the defendant's officers, and his efforts in procuring the arrest of persons charged with the thefts, were made for the purpose of protecting his client, Feldman, in a pending controversy between him and one Richards, who, it is intimated, together with Feldman, received certain property which it is charged was stolen from the defendant company. Hofnauer testified that plaintiff said to him:

"I have a client named Feldman who knows something about some goods being stolen from your place. I can't give you very much information, can't give any names. I can't say very much, but this Feldman has been a salesman for Richards Company and there has been another salesman there by the name of Morowitz. They have been selling waste which they claim came from the Chicago Waste Company and was stolen from there. We want to get the goods on this Richards. My client has a case against him. I don't remember the particulars of the case. I said, 'If you get any information would you mind calling me up?' On Monday morning Feldman came to the office of defendant and said, 'Did you hear any more about this stock being stolen?' I said, 'We have a line on it - nothing else,' to which he replied, 'If you get anything will you call up Lepine?' (the plaintiff). I said I would."

We think in view of this testimony the defendant should have been permitted to show that Lepine's presence in the case was for the purpose of protecting or aiding his alleged client, Feldman. If Hofnauer's testimony be true then there is some evidence in the record tending to show that Feldman was the client of plaintiff, and from the excluded evidence and that admitted it might fairly be argued that Lepine's efforts to discover and prosecute persons charged with stealing defendant's property were for the purpose of aiding Feldman in his controversy with Richards. Believing,

to this offer was sustained. We think this evidence should have been admitted.

It should be kept in mind that we are dealing

here with the conduct of an attorney, an officer of the court. The contention is that Lepine's voluntary offer of information to the defendant's officers, and his efforts in procuring the arrest of persons charged with the thefts, were made for the purpose of protecting his client, Feldman, in a pending controversy between him and one Richards, who it is intimated, together with Feldman, received certain property which it is charged was stolen from the defendant company. Holman testified that Plaintiff said to him:

"I have a client named Feldman who knows something about some goods being stolen from your place. I can't give you very much information, can't give any names. I can't say very much, but this Feldman has been a salesman for Richards Company and there has been another salesman there by the name of Richards. They have been selling waste which they claim came from the Chicago Waste Company and was stolen from there. We want to get the goods on this Richards. My client has a case against him. I don't remember the particulars of the case. I said, 'If you get any information would you mind calling me up?' On Monday morning Feldman came to the office of defendant and said, 'Did you hear any more about this stock being stolen?' I said, 'We have a line on it - nothing else.' To which he replied, 'If you get anything will you call up Lepine?' (the Plaintiff). I said I would."

We think in view of this testimony the de-

endant should have been permitted to show that Lepine's presence in the case was for the purpose of protecting or aiding his alleged client, Feldman. If Holman's testimony be true then there is some evidence in the record tending to show that Feldman was the client of Plaintiff, and from the excluded evidence and that admitted it might fairly be argued that Lepine's efforts to discover and prosecute persons charged with stealing defendant's property were for the purpose of aiding Feldman in his controversy with Richards. Believing

as we do, that it was error to exclude this evidence, the judgment of the Municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

88 - 24000

JOHN E. MERZ and CHARLES
G. MERZ, trading, etc.,
Appellants,

vs.

LEON R. STEWART,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 508

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant bought in Chicago a motor cycle and side car from one J. A. Cowles and paid him therefor \$150. The cycle and car were manufactured in Chicago by the Excelsior Motor Manufacturing Co. Before concluding the purchase defendant telephoned the manufacturer inquiring as to Cowles' title, and was informed that the cycle and car were paid for. It appears that Cowles bought the cycle and car from plaintiffs in Indianapolis, Indiana, and that plaintiffs had taken from Cowles a conditional sales contract therefor. Plaintiffs demanded the cycle and car from defendant, who refused to surrender the same and thereupon this suit in replevin was brought. On a trial before the court without a jury there was a finding and judgment for defendant.

The conditional sales contract was not recorded in any place either in Indiana or Illinois.

Plaintiffs contend that the rights of the parties must be determined by the law of Indiana, and that by the law of that State the contract between plaintiffs and Cowles was good not only as between themselves, but as against third parties. *cf*

Under the circumstances of this case we think that the question of the contract between plaintiffs and

U. S. DEPT. OF JUSTICE
APPELLATE DIVISION

U. S. DEPT. OF JUSTICE
COURT OF APPEALS

U. S. DEPT. OF JUSTICE
APPELLATE DIVISION

211 A. 308

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

Defendant bought in Chicago a motor cycle and also car from one E. A. Cowles and sold him therefor \$250. The cycle and car were manufactured in Chicago by the defendant motor manufacturing co. Before concluding the purchase defendant telephoned the manufacturer inquiring as to Cowles' title, and was informed that the cycle and car were sold for. It appears that Cowles bought the cycle and car from plaintiff in Indianapolis, Indiana, and that plaintiff had taken from Cowles a conditional sales contract therefor. Plaintiff demanded the cycle and car from defendant, who refused to surrender the same and threatened this suit in replevin was brought. On a trial before the court without a jury there was a finding and judgment for defendant.

The conditional sales contract was not recorded in any place either in Indiana or Illinois. Plaintiff contends that the rights of the parties must be determined by the law of Indiana, and that by the law of that State the contract between plaintiff and Cowles was good not only as between themselves, but as against third parties. Under the circumstances of this case we hold that the question of the contract between plaintiff and

Cowles is not a matter for our determination in this proceeding. Plaintiffs put it within the power of Cowles to remove the cycle and car out of the State of Indiana, thereby vesting him with prima facie evidence of ownership and with apparent power to sell the same free from their claim. To hold otherwise in the circumstances of this case would stop the sale of this kind of personal property.

Defendant had no more reason to investigate Cowles' title in Indiana than in any other State. Especially is this so when the evidence gained by defendant showed that the cycle and car had been manufactured in Chicago. Comity between States does not proceed to such an extreme. The following observations by the late Mr. Justice Adams in Rosenbaum v. James, 77 Ill. App. 295, are pertinent here:

"We cannot conclude this opinion, however, without some suggestions as to the rule, apparently supported by numerous adjudications, that the constructive notice of a mortgage resulting from its acknowledgment and recording in the State in which it is executed, is also constructive notice in other States, and to the citizens of other States to which the mortgaged property may be removed, thus giving to the law of the State in which the mortgage is executed extra-territorial effect. The courts base this rule on the doctrine of interstate comity, but it seems to us that the doctrine should not be extended to the detriment of citizens of the State. In many cases the rule that citizens of this State are bound by constructive notice of a chattel mortgage executed and recorded in another State, necessarily and inevitably operates to the detriment of such citizens."

This case was affirmed in 179 Ill. 112.

In Illinois the possession of personal property is prima facie evidence of ownership, and unless a lien is reserved in accord with the statutes of the State, the possessor may convey a good title to a bona fide purchaser, provided he is without notice of any intervening equities or claims.

The judgment of the Municipal Court is right and is affirmed.

AFFIRMED.

THE JOURNAL OF THE SUPREME COURT IS FILED AND CLAIMS.

PROVIDED NO WRITING NOTICE OF ANY INTERESTING SITUATION OR

POSSESSOR MAY OBTAIN A GOOD TITLE TO A REAL ESTATE PURCHASER.

RESERVED IN ACCORD WITH THE STATUTES OF THE STATE. THE

IS WARRANT EVIDENCE OF OWNERSHIP, AND UNLESS A LIE IS

IN ILLINOIS THE POSSESSION OF PERSONAL PROPERTY

THIS CASE WAS AFFIRMED IN 1931, 112.

EVIDENTLY OPERATES TO THE DETRIMENT OF SUCH CITIZENS."

AND IN MANY CASES THE RULE THAT CITIZENS OF THIS STATE ARE

BE EXTENDED TO THE DETRIMENT OF CITIZENS OF THE STATE.

COURTS HAVE THIS VIEW OF THE LOCATION OF THE STATE

NOTICE IS EXERCISED EXTRA-TERRITORIAL EFFECT. THE

MOVES, THAT, ALTHOUGH TO THE LAW OF THE STATE IN WHICH THE

OTHER STATES TO WHICH THE PROPERTY MAY BE RE-

STRICTIVE NOTICE IN OTHER STATES, AND TO THE CITIZENS OF

AND IN THE CASE IN WHICH IT IS EXERCISED, IS ALSO CON-

A MANNER RELATING FROM ITS MANAGEMENT AND RECORD-

BY NUMEROUS ADMINISTRATIONS. THAT THE CONSERVATIVE USE OF

AND SOME SUGGESTIONS AS TO THE RULE, GENERALLY APPROVED

THE COURT CONCLUDES THIS OPINION, HOWEVER, WITH-

COLLEGE V. JAMES, 77 Ill. App. 2d, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

WESTERN IRON CONSTRUCTION
CO., a corporation,
Appellee,

vs.

S. A. STERNFELD and HARRY
N. STERNFELD,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 509

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for \$176.95
on a trial before the court, and defendants appeal.

The action was for the contract price of 90
angle irons. The defense interposed was that but 39 of the
irons were delivered and that 51 remained undelivered. Be-
fore trial defendants paid plaintiff for the 39 angle irons
delivered, so the controversy is confined to 51 angle irons.
Query: Does the evidence support the finding of the trial
Judge that these 51 angle irons were delivered? We are of
the opinion that it does not. 7

There is positive evidence that but 39 angle
irons were delivered and there is no evidence supporting the
contention of plaintiff regarding delivery of the 51. Further-
more, plaintiff's own witness, who is supposed to have delivered
them, discredits this contention. This witness was the ex-
pressman who carried the angle irons. He testified that he had
but 70 pieces on his wagon, some of which he placed near the
tool chest in front of the building which defendants were
engaged in constructing, and that he would not be sure as to
the number. This falls far short of proof of delivery of 90
pieces. Moreover, as no one for defendants received these
pieces or checked them up, merely putting them in the street
alongside the curb, as testified to by plaintiff's expressman,
did not constitute a delivery either express or symbolical. 7

RECEIVED FROM INVESTIGATION
U.S. - 6402113
Appellate

U.S. DEPT. OF JUSTICE
CHICAGO, ILL.

U.S. DEPT. OF JUSTICE
CHICAGO, ILL.

ST. PAUL, MINN.

RE. JUSTICE EDWIN BELMONT THE CHIEF OF THE COURT.

Plaintiff recovered a judgment for \$18,000.

on a trial before the court, and defendant appeal.

The action was for the contract price of 30

single items. The balance involved was paid but 25 of the

items were delivered and 25 of remained undelivered. De-

fendant trial determined that plaintiff for the 25 single items

delivered, as the majority is contained in 25 single items.

Plaintiff: Does the evidence support the finding of the trial

judge that 25 of single items were delivered? Is one of

the opinion that it does not.

There is positive evidence that 25 single

items were delivered and there is no evidence supporting the

conclusion of plaintiff regarding delivery of the 25. Further-

more, plaintiff's own witness, who is supposed to have delivered

them, contradicted this conclusion. This witness was the ex-

pression and carried the single items. He testified that he had

but 25 pieces of the items, some of which he placed near the

trial judge in front of the building which defendant was

engaged in constructing, and that he would not be able to

the number. This trial for short of proof of delivery of 30

pieces. However, as no one for defendant received these

pieces or ordered them up, merely putting them in the street

outside the door, as testified to by plaintiff's expert,

it did constitute a delivery either express or implied.

Plaintiff's witness, who testified that he checked up 90 angle irons the morning following the expressman's placing of what he thinks was 70 pieces alongside the curb, was evidently mistaken as to the number. On the other hand, the testimony that but 39 of these irons were found in the place where plaintiff had caused its expressman to place the irons is uncontradicted. As to the 51 angle irons plaintiff has failed to establish delivery, and its claim therefore fails.

The judgment of the Municipal Court is reversed with judgment of nil capiat and for costs here and below.

REVERSED WITH JUDGMENT OF

NIL CAPIAT AND FOR COSTS.

Winstill's address, who testified that he checked up on
 and from the address following the expressman's placing
 of what he thinks was 75 pieces alongside the curb, was evi-
 dently mistaken as to the number. On the other hand, the
 testimony that out of these items were found in the
 place where Winstill had caused the expressman to place the
 items is uncontradicted. As to the 51 single items Winstill
 has failed to establish delivery, and the same therefore
 fails.

The judgment of the principal court is reversed
 with judgment of all cases and for costs here and delay.

Winstill vs. Winstill

All Cases and Costs

HORACE D. KENNEDY,
Appellee,

vs.

NORTH AVENUE MOTOR SALES
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 510

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$75 on a finding of the court, to whom the cause was submitted by agreement of the parties, and defendant appeals.

This is a small case measured by the amount involved, but, notwithstanding plaintiff has failed to appear and defend against the appeal, there is an underlying principle of honesty which this court must recognize.

Plaintiff purchased a motor truck of defendant, paying \$75 for it. Defendant represented that the truck was usable and movable. It was neither. The contract was in writing and contained a condition that the truck was "to be running and in usable condition." It seems the truck would not run; that in attempting to start it the engine made much noise but the truck would not move. When plaintiff demanded of defendant a return of the \$75 which he paid for the truck he was told that defendant was not interested, that it was not going to give the money back and that "they didn't want the damn thing around."

There is no pretense by defendant that the truck can be run. It is contended that it was sold for "junk." However this may be, it is a sufficient answer to say that such is not the contract. A due regard for common honesty requires that the judgment of the Municipal Court be affirmed, which is accordingly done.

AFFIRMED.

IN THE CIRCUIT COURT OF THE STATE OF FLORIDA

IN RE: THE ESTATE OF JAMES H. SMITH

JOHN A. SMITH, Plaintiff,
vs.
JAMES H. SMITH, Defendant.

THE COURT HEREBY FINDS THAT THE DEED IS VALID.

Plaintiff had judgment for \$75 on a finding of the court, to whom the cause was submitted by agreement of the parties, and defendant appeals.

This is a small case brought by the widow involved, and notwithstanding Plaintiff has failed to appear and defend against the appeal, there is an undisturbed title of property which this court must recognize.

Plaintiff purchased a motor truck of defendant, paying \$75 for it. Defendant represented that the truck was usable and serviceable. It was neither. The contract was in writing and contained a condition that the truck was "to be running and in usable condition." It seems the truck would not run; that in attempting to start it the engine made such noise that the truck would not move. When Plaintiff demanded a return of the \$75 which he paid for the truck he was told that defendant was not interested, that it was not going to give the money back and that "they didn't want the damn thing anymore."

There is no pretense by defendant that the truck was for sale. It is contended that it was sold for "junk." However, this may be, it is a sufficient matter to say that such is not the contract. A law exists for common honesty requires that the judgment of the judicial court be affirmed, which is accordingly made.

182 - 24103

ELANCHE G. LANE,
Appellee.

vs.

FREDERICK J. LANE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 511

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

The parties to this cause were married December 24, 1896. The fruit of this union is one child, Francis, whose custody is not now involved, as he is at the present time patriotically serving in the army of his country in its war with Germany. On October 7, 1910, complainant filed her bill for separate maintenance, alleging misconduct on the part of defendant which has compelled her to live separate and apart from him since the 3rd of August, 1908; that defendant has refused to live with his wife, notwithstanding she has at all times been willing to live with him.

An order for \$50 solicitor's fees and a payment of \$10 a week for the support of the then infant child of the marriage was entered on October 29, 1910.

The defendant answered complainant's bill generally, denying the averments thereof.

It was not until more than eight years after the bill was filed that the cause was tried. In the meantime the parties have lived separate and apart. During most of the time complainant has had the custody of their child, Francis.

Complainant charged in her bill that defendant had been guilty of unkind and cruel conduct toward her.

STATE OF TEXAS
COUNTY OF DALLAS

WILLIAM J. LAMM,
Defendant,
vs.
WILLIAM J. LAMM,
Plaintiff.

WILLIAM J. LAMM

IN JUDICIAL PROCEEDING BETWEEN THE PARTIES OF THE ABOVE

The parties to this cause were married December 22, 1920. The first of this union is one child, female, whose custody is now now involved, as he is at the present time practically serving in the army of his country in the war with Germany. On October 7, 1910, complaint filed her bill for separate maintenance, alleging that defendant on the part of defendant which was compelled her to live separate and apart from him since the 21st of August, 1908; that defendant has refused to live with his wife, as withstanding and has at all times been willing to live with

him.
An order for \$50 solicitor's fees and a copy sent of \$10 a year for the support of the then infant child of the marriage was entered on October 23, 1910. The return of married complainant's bill generally, denying the averments thereof. It was not until more than eight years after the bill was filed that the cause was tried. In the meantime the parties have lived separate and apart. During most of the time complainant has had the custody of their child, female.

Complaint changed to her bill that defendant had been guilty of making and criminal conduct toward her.

which she supported by proof. She also testified that defendant had become enamoured of another woman and so told her, and said that he could not continue to live with her as his wife. Defendant left complainant, cut off her account at the grocery, meat market and other stores, shut off the gas and electric light in their apartment and refused to pay rent therefor, and removed himself therefrom. There was also testimony regarding his consorting with other women, sufficient to raise a well grounded inference of immorality.

We think the evidence is such that the chancellor might reasonably find, as he did, that complainant was living separate and apart from defendant without her fault.

Defendant is inconsistent in his defenses. He was principal in a public school and complainant was a teacher in a public school. Notwithstanding the fact that he received \$8050 of her earnings as a school teacher, yet he claims that he protested against his wife's teaching school because he wanted her at home to look after the house as a matter of domestic economy and good housekeeping. In the light of these facts his contentions cannot be taken very seriously. Then again, defendant resists the decree for the allowance of separate maintenance on the ground that complainant is self-supporting as a school teacher. At the time of the trial it was established that defendant was principal of the Edward Jenner School and teacher in a night school and that therefrom he was in receipt of an annual income of \$4100; that complainant's salary as a school teacher was \$1550; that at the time of the trial her health was in a precarious condi-

which was reported as great. She also testified that defendant had become convinced of the defendant's guilt and so told her, and said that he could not believe it was with her as his wife. Defendant's self-complaint, and all her own complaints at the property, were made and were known, about off the gas and electric light in their apartment and refused to pay rent therefor, and removed himself therefrom. There was also testimony regarding his conversation with other women, sufficient to raise a well-founded inference of immorality.

It is clear that evidence is shown that the defendant called upon the defendant's wife, as he did, from defendant's living quarters and spent time with defendant's wife and child.

Defendant is represented in his defense, that he was principal in a public school and defendant was a teacher in a public school. Defendant testified that the fact that he received \$1000 of his earnings as a school teacher, yet he claims that he received against his wife's earnings second because he worked for at least a week after the house as a matter of domestic economy and householding. In the light of these facts his contention cannot be taken seriously. Then again, defendant received the money for the allowance of separate maintenance on the ground that defendant is self-supporting as a school teacher. At the time of the trial it was established that defendant was principal of the Edward Jenner School and teacher in a night school and that therefore he was in receipt of an annual income of \$1000; that defendant's salary as a school teacher was \$1000; that at the time of the trial his health was in a precarious condition.

tion, her physician testifying that she needed to go to a hospital to undergo a surgical operation; and that her health was impaired at the time of the trial to such an extent that she would not be able to work or teach for some time. The court made complainant an allowance of \$65 a month together with \$300 necessary expenses of an operation, hospital expenses, doctor's fees, etc., which amount was the estimate of cost made by the medical witness, and also an allowance of \$200 for solicitor's fees. The solicitor's fees allowed are, it is conceded, reasonable and no complaint regarding the same is made on this appeal.

There is no evidence in the record in denial of complainant's alleged physical condition and necessities as testified to by herself and her medical adviser. Defendant, however, complains that the nature of her ailment is not made sufficiently specific or certain by the proofs. However this may be, we are of the opinion that the medical witness's statement that her physical condition is such that she must undergo a surgical operation, that she is in a nervous condition and will not be able to work for some time, that the operation will lay her up for from four to six weeks, and the further fact, undenied, that she has no accumulation of money or property with which to support herself during her illness and convalescence, was sufficient to warrant the chancellor in making an allowance of \$65 a month. It was proper also to allow \$300 as a necessary expense of the surgical operation which it was established by the evidence plaintiff must undergo.

The earnings and income of defendant warranted these allowances. If the condition of complainant and the financial circumstances of defendant should materially change in the future, it will be proper for the chancellor, on appli-

them, her physician testifying that she needed to go to a hospital to undergo a surgical operation; and that her husband was impaired at the time of the trial so much so that he would not be able to work or furnish for her care. The court made complaint an allowance of \$25 a month together with some necessary expenses of an operation, hospital expenses, doctor's fees, etc., which amount was the estimate of cost made by the medical witness, and also an allowance of \$25 for solicitor's fees. The solicitor's fees allowed are, it is contended, reasonable and no complaint regarding the same is made on this appeal.

There is no evidence in the record in regard to complainant's alleged physical condition and necessaries as testified to by herself and her medical adviser. Defendant, however, contends that the nature of her illness is not made sufficiently specific or certain by the proofs. However this may be, we are of the opinion that the medical witness's statement that her physical condition is such that she must undergo a surgical operation, that she is in a nervous condition and will not be able to work for some time, that the operation will lay her up for from four to six weeks, and the further fact, understood, that she has no accumulation of money or property with which to support herself during her illness and convalescence, are sufficient to warrant the chancellor in making an allowance of \$25 a month, if we prefer that to allow \$50 as a necessary expense of the surgical operation which is not controverted by the evidence. It is not material that the costs and income of defendant were not

these witnesses. If the condition of complainant and the financial circumstances at defendant would materially change in the future, it will be proper for the chancellor, on appeal,

cation to him, to vary the allowance which defendant is ordered to pay to such sum as may be warranted by such altered financial condition.

There is no error in procedure discoverable from the record which warrants a reversal of the decree of the Superior Court, and it is therefore affirmed.

AFFIRMED.

...to him, so very the witness which defendant is or-
dered to pay to him as may be warranted by such alleged
Theoretical condition.

There is no other in procedure discoverable from
the record which warrants a reversal of the verdict of the
jury, and it is therefore affirmed.

APPROVED.

WESTERN HARDWARE MANUFACTURING
CO., a corporation,

Appellee.

vs.

H. B. T. CHANDLER and W. I.
LINDGREN,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 513

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

There was judgment in the trial court for \$155 by confession under a power of attorney contained in a lease under seal between the parties to certain premises in Chicago.

Defendants moved to vacate this judgment, which motion they supported by affidavits, but the motion was denied and this appeal from that order prayed and perfected.

Defendants sought to avoid their liability upon two grounds: First, that the liability was that of a corporation, the Security Tool Works, of which defendants were officers; and, second, that by a parol agreement the lease and possession of the demised premises were surrendered.

The affidavits submitted presented no meritorious defense. The fact, if it is a fact, that the Security Tool Works occupied the premises demised and paid the rent accruing during the time of such occupation in no way affected the lease between the parties. The obligations of the parties under the lease remained unimpaired, notwithstanding the fact may be as alleged.

The lease could not be terminated contrary to its covenants by parol. Even conceding the facts to be as stated in the affidavits supporting the motion, there was no legal surrender of possession of the demised premises and acceptance thereof by plaintiff.

WESTERN NATIONAL BANK
CO. of Corporation
vs.
E. E. T. CHAMBER and W. T.
LINDEN
Appellants.

COURT OF CHICAGO
WESTERN NATIONAL BANK

211 A. 213

THE COURT OF CHICAGO DELIVERED THE DECISION OF THE COURT.

There was judgment in the first count for \$150 by confession under a power of attorney contained in a lease under seal between the parties to certain premises in Chicago, defendants moved to vacate this judgment, which motion they supported by affidavits, but the motion was denied and this appeal from that order was granted and perfected. Defendants sought to avoid their liability upon the grounds: First, that the liability was that of a co-tenant, the security took form, of which defendants were officers and agents, and by a formal agreement the lease and possession of the premises was transferred. The affidavits submitted presented no satisfactory defense. The fact, it is a fact, that the security took form occupied the premises leased and paid the rent according during the time of such occupation in no way affected the lease between the parties. The obligations of the parties under the lease remained unimpaired, notwithstanding the fact that as alleged. The lease could not be terminated contrary to its covenants by parcel. Even assuming the facts to be as stated in the affidavits supporting the motion, there was no legal surrender of possession of the leased premises and no discharge thereby of liability.

The rule of law is that a sealed executory contract cannot be changed, altered or modified by parcel. Becker v. Becker, 250 Ill. 117; Alschuler v. Schiff, 164 ibid 298. This is the rule of the common law which prevails in this jurisdiction. Shannon v. McGraw, 20 Ill. 101; Goldsborough v. Cable, 140 ibid 269.

We cannot say that the trial Judge in denying the motion to vacate the judgment abused the discretion which the law reposed in him, there being no facts stated in the affidavits supporting the motion which constituted any defense upon the merits.

The judgment of the Municipal court is affirmed.

AFFIRMED.

The rule of law is that a sealed executory con-

tract cannot be changed, altered or modified by parol. Becker

v. Becker, 23, 111, 112; Becker v. Becker, 124, 112, 250.

This is the rule of the law of the State of New York.

Becker v. Becker, 23, 111, 112; Becker v. Becker, 124, 112, 250.

v. Becker, 124, 112, 250.

We cannot say that the trial judge is denying

the motion to rescind the judgment upon the objection

which the law requires in this, there being no facts stated

in the affidavit supporting the motion which would entitle any

defendant to the relief.

The judgment of the court is affirmed.

affirmed.

ATTEST.

JAMES F. BISHOP, Administrator
of the Estate of James Rowe,
deceased,

Appellant,

vs.

ROSE H. ROWE,

Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

211 I.A. 514

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The bill in this case seeks to recover from defendant certain personal property which it is averred belongs to the estate of her deceased husband. She defends on the contention that the property claimed was given to her by her husband in his lifetime, that she reduced the same to her possession and that all of it remained in her possession from the time when the same was given to her to the time of her husband's death and was still in her possession on the date the bill was filed.

On hearing the chancellor dismissed the bill for want of equity.

James Rowe, the husband of defendant, died intestate leaving defendant, his widow, and three children, two by his first marriage and one by defendant, his second wife, who are his only heirs at law.

We think it clear that complainant failed to maintain the averments of his bill that the personal property in question was the property of his intestate. It is not controverted that the property claimed by complainant was originally purchased by complainant's intestate with his own money, while on the other hand it is equally clear that the property was bought for and delivered to defendant by deceased.

JAMES W. HOWE, Administrator of the Estate of James Howe, deceased,

Appellant,

vs.

ROSE H. HOWE,

Appellee.

ALLIANCE FROM DISTRICT COURT OF COLUMBIA COUNTY.

2111A.514

THE JUSTICE MOULDERS DELIVERED THE DECISION OF THE COURT.

The bill in this case seems to recover from defendant certain personal property which it is averred belongs to the estate of her deceased husband. The defendant on the contention that the property claimed was given to her by her husband in his lifetime, that she retained the same to her possession and that all of it remained in her possession from the time when the same was given to her to the time of her husband's death and was still in her possession on the date the bill was filed. On hearing the chancellor dismissed the bill

for want of equity.

James Howe, the husband of defendant, died intestate leaving defendant, his widow, and three children, two by his first marriage and one by defendant, his second wife, who are his only heirs at law.

It is clear that complainant failed to maintain the averments of his bill that the personal property in question was the property of his intestate. It is not controverted that the property claimed by complainant was specifically bequeathed by complainant's intestate with his own money, while in the other hand it is equally clear that the property was bequeathed for and delivered to defendant

by deceased.

The property about which this controversy mainly centers is certain bonds secured by certain trust deeds upon Chicago real estate, which were purchased by deceased through the real estate firm of Chandler, Hildreth & Co. These purchases were made through a Mr. John D. Wild, a representative of the firm, who was informed by deceased that he bought the bonds for defendant, his wife, and that the same were bought with her money. The deceased gave his money as he earned and received it to his wife, with the understanding that such of it as was not used for family expenses belonged to her, and it was from these savings that deceased bought the bonds now claimed to belong to his estate. It further appeared that the interest on these bonds was during the lifetime of deceased paid to defendant by checks to her order.

Deceased was so cautious regarding evidence of ownership of these bonds by defendant that he consulted Mr. Wild and asked him if there was anything more necessary to be done on his part to make effective such ownership. He then informed Mr. Wild that defendant owned the bonds which he had purchased of Chandler, Hildreth & Co., that the homestead was the only property he had any interest in, and that the title thereto was held in joint tenancy by himself and his wife. Complainant also examined defendant as his witness and her evidence makes it clear that the bonds in question were bought for her by her husband and given to her, that she always had them in her possession and that she received all the interest paid thereon from the time of their purchase to the death of her husband. Other witnesses were produced who corroborated in important particulars the testimony of defendant and Mr. Wild. It also appears that at the time James

The property shown in this exhibit was actually
 owned by certain bonds secured by certain trust deeds upon
 Chicago real estate, which were purchased by deceased through
 the real estate firm of Chandler, Kilduff & Co. These pur-
 chases were made through a Mr. John D. Wild, a representative
 of the firm, who was informed by deceased that he bought the
 bonds for defendant, his wife, and that the same were bought
 with her money. The deceased gave his money as he wanted and
 received it as his wife, with the understanding that such of
 it as was not used for family expenses should be paid to her, and
 it was from these savings that deceased bought the bonds now
 claimed to belong to his estate. It further appeared that
 the interest on these bonds was being paid to the interest of de-
 ceased paid to defendant by checks as per record.

Deceased was an excellent reputation evidence of
 ownership of these bonds by defendant and he admitted it.
 Wild was asked if there was anything more necessary to be
 done on his part to make effective such ownership. He then
 informed Mr. Wild that defendant asked the same which he had
 purchased of Chandler, Kilduff & Co., that the bonds were
 the only property he had any interest in, and that the title
 thereto was held in joint tenancy by himself and his wife.
 Complaint also examined defendant as his witness and her
 evidence makes it clear that the same in question were
 bought for her by her husband and given to her, that she
 always had them in her possession and that she received all
 the interest paid thereon from the time of their purchase to
 the death of her husband. Other witnesses were produced who
 corroborated in important particulars the testimony of de-
 fendant and Mr. Wild. It also appears that at the time de-
 fendant and Mr. Wild, it also appears that at the time de-

Rowe was married to defendant he was without property and that all the property which defendant had was accumulated since her marriage and mainly by her thrift.

We think there can be no doubt from the evidence in the record before us that defendant's husband made a gift to her of all the bonds involved in the dispute engendered by the bill, that she always has been the owner and in possession thereof, and that such ownership and possession date from the time when the same were purchased. Furthermore, there is no evidence in this record that the deceased ever treated or dealt with the bonds as his own property, but that on the contrary he purchased them for and delivered them to defendant. Every statement he ever made regarding them supports and verifies the conclusion at which we have arrived as above indicated. Complainant failed to maintain by his proofs the gravamen of his charges in the bill - that defendant wrongfully claims and pretends that the deceased during his lifetime made a gift of said property to her and that she was the owner thereof, and that her claim thereto was false.

It is an elementary principle of law that a gift by a husband to his wife can be sustained without any actual consideration other than that which arises from the relationship existing between them. Love and affection are sufficient considerations to support such a gift. While the reasoning in Clavey v. Schnadt, 272 Ill. 464, supports defendant's contention, yet in this case we find none of the embarrassing features found in that. Here there is no evidence that deceased retained any interest, control or dominion over the bonds bought of Chandler, Hildreth & Co., while in the Clavey case there were acts on the part of the donor which were susceptible of being interpreted as indicating the reten-

Howe was married to defendant he was without property and that all the property which defendant had was accumulated since her marriage and mainly by her thrift.

We think there can be no doubt from the evi-

dence in the record before us that defendant's husband made a gift to her of all the bonds involved in the dispute enumerated by the bill, that she always has been the owner and in possession thereof, and that such ownership and possession date from the time when the same were purchased. Furthermore,

there is no evidence in this record that the deceased ever treated or dealt with the bonds as his own property, but that on the contrary he purchased them for and delivered them to defendant. Every statement he ever made regarding them supports and verifies the conclusion at which we have arrived as above indicated. Complaint failed to maintain by its proofs the gravamen of its charges in the bill - that defendant wrongfully claims and pretends that the deceased during his lifetime made a gift of said property to her and that she was the owner thereof, and that her claim thereto was false.

It is an elementary principle of law that a gift by a husband to his wife can be sustained without any actual consideration other than that which arises from the relationship existing between them. Love and affection are sufficient considerations to support such a gift. While the reasoning in Clay v. Schenck, 273 Ill. 444, supports defendant's contention, yet in this case we find none of the embarrassing features found in that case. Here there is no evidence that deceased retained any interest, control or dominion over the bonds bought of Standard Oil Co., while in the Clay case there were notes on the part of the donor which were suggestive of being interested as indicating the inten-

tion of ownership of the property the subject of the gift.

The rights of creditors not intervening, equity will sustain the gift as an executed contract where the possession of the subject of the gift is in the donee.

Gill v. Woods, 81 Ill. 64, in which it is said that "Chancellor Kent, speaking as to the effect in equity, lays it down: Gifts from the husband to the wife may be supported as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. 2 Kent Com. 163."

The decree of the Superior Court being right is affirmed.

AFFIRMED.

tion of ownership of the property the subject of the gift.

The rules of construction not intervening, equity

will sustain the gift as an executed contract where the

possession of the subject of the gift is in the donee.

Gift v. Bonds, 111. 44, in which it is said that

"Chancellor Kent, speaking as to the effect in equity, says

it down: Gifts from the husband to the wife may be sup-

ported as her separate property, if they be not prejudicial

to creditors, even without the intervention of trustees.

S Kent Com. 103."

The effect of the Superior Court being that

is affirmed.

APPEALS.

The appeal from the judgment of the Superior Court is

dismissed with costs.

THE COURT OF COMMON PLEAS, IN AND FOR THE COUNTY OF

ALBANY, IN SENATE CHAMBER, AT ALBANY, IN SENATE CHAMBER,

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MARY R. PIKE, EUGENE S. PIKE,
WILLIAM W. PIKE and CHARLES
B. PIKE, heirs of Eugene S.
Pike, deceased,

Appellants,

vs.

S. ENGLER,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 520

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause started on a confession of judgment under a warranty of attorney in defendant's lease from plaintiffs' immediate ancestor, which the court, in the exercise of its equitable powers over such judgments on motion supported by affidavits, opened and let defendant in to plead to the merits. On a trial before court and jury there was a verdict for defendant and a judgment of nil capiat and for costs, and plaintiffs appeal.

The claim is for March and April rent, 1917, for certain space in the Mentor building under a lease from Eugene S. Pike to defendant expiring April 30, 1917. It appears without contradiction that defendant was treasurer of the corporation known as Engler & Burgess and that the corporation was prior to August 14, 1916, occupying the premises leased by defendant, and that said corporation needing more space on the date last mentioned entered into another lease for the premises demised to Engler, with additional space, for the term of five years commencing May 1, 1917, following the expiration of the then existing lease; that by the terms of this new lease it was provided that certain repairs and alterations should be made prior to April 30, 1917. These things were not done as agreed.

U.S.A. 220

COURT OF CHINA

LETTER FROM CHINA

WILLIAM A. TINE AND CHARLES
U. TINE, heirs of
W. TINE, deceased,
Appellants,
vs.
U. TINE,
Appellee.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This cause started on a confession of judgment under a warranty of attorney in defendant's lease from plaintiff's immediate ancestor, which the court, in the exercise of its equitable powers over such judgments on motion supported by affidavits, opened and let defendant in to plead to the merits. On a trial before court and jury there was a verdict for defendant and a judgment of all costs and for costs, and plaintiff's appeal.

The claim is for March and April 1917, for certain space in the renter building under a lease from Eugene A. Tine to defendant expiring April 30, 1917. It is said without contradiction that defendant was treasurer of the corporation known as Knickerbocker 1909 and that the corporation was prior to August 14, 1916, occupying the premises leased by defendant, and that said corporation holding more space on the date last mentioned entered into another lease for the premises leased to Knicker, with additional space, for the term of five years commencing May 1, 1917, following the expiration of the then existing lease; that by the terms of this new lease it was provided that certain repairs and alterations should be made prior to April 30, 1917. These repairs were not made as required.

Defendant contends that in reparation for such default plaintiffs by their agent agreed that if defendant would make certain repairs on the demised premises, waive other repairs which plaintiffs contracted to make, and waive default therefor, plaintiffs would allow defendant the last two months rent under the lease of defendant. It is not disputed that the following agreement in writing was made between the parties subsequent to May 1, 1917:

"If you will eliminate the west door (now known as Door No. 60), when you change the entrance, do the electric wiring, hang six electric fixtures which we have on hand, and two drop lights, wash off and calcimine the walls and ceiling at your expense; we will make all other improvements at our expense and pay the full rent from May 1, 1917, as per terms of lease dated August 14, 1916."

Nor is it contended that defendant performed his part of this agreement. However, plaintiffs seriously contend that because no mention is made in this agreement of March and April rent, therefore its payment has not been waived, and further that the agent had no authority to make an agreement to waive the rent.

It is clear from the evidence that defendant had a just claim against the plaintiffs for their non-compliance with the covenant in the lease regarding repairs and alterations, and that such dispute was the subject of settlement between the parties.

Plaintiffs do not seriously contend that the agreement to waive March and April rent was not made, but seek to escape from the effect of the agreement on the ground that it was, if made, not enforceable because the agent who made the agreement had no authority so to do.

If the latter contention be conceded - which it is not - it then remains for us to construe the written agreement.

While it is true that the March and April rent

Defendant contends that in reputation for such
defendant, Plaintiff by their agent stated that if defendant
would make certain repairs to the damaged premises, and make
other repairs which Plaintiff's agent would be asked to make, and make
defendant's agent, Plaintiff would allow defendant the last
two months rent under the lease of defendant. It is not dis-
puted that the following agreement in writing was made between
the parties subsequent to May 1, 1917:

"It was well eliminated the rent for (now known
as Room No. 80), which was changed the entrance, at the time
the Plaintiff, Harry W. Plummer, Plaintiff, who was on
hand, and two other men, were at the entrance the wife
and Plaintiff's agent, who will make the repairs la-
proposed at our expense and pay the rent from May 1,
1917, on per terms of lease dated August 1, 1916."

It is contended that defendant performed his
part of this agreement. However, Plaintiff seriously contends
that because no action is made in this agreement of date and
April rent, therefore the payment has not been made, and
further that the agent had no authority to make an agreement
to waive the rent.

It is clear from the evidence that defendant had
a just claim against the Plaintiff for their non-compliance
with the contract in the repairs regarding repairs and altera-
tions, and that such claim was the subject of agreement
between the parties.

Plaintiff do not seriously contend that the
agreement to waive March and April rent was not made, but
seek to escape from the effect of the agreement on the ground
that it was, in fact, not enforceable because the agent who
made the agreement had no authority to do so.

It has latter been held by the court - which is
is not - it was decided that as the contract was written and
made.

While it is true that the March and April rent

is not specifically mentioned in this writing, still what is meant by the words "pay the full rent from May 1, 1917, as per terms of lease dated August 14, 1916," is a matter of construction in the light of all the environing circumstances. At the time this writing was made the rent for March and April was due. Why mention the rent payable under the new lease if there was not something back of it such as the past due rent? It is undoubtedly true that the intention of the parties was clumsily expressed in this writing, but from all the evidence it is clear that the March and April rent was waived in consideration of a release for damages suffered by the default of the landlord in not making repairs within the time agreed in the lease.

In the light of the evidential facts it is not to be doubted that the writing referring to full payment of rent from May 1, 1917, was intended to exclude the liability for the March and April rent, which rent was paid by the waiver of defendant's claim for damages. The rent was therefore paid in virtue of a compromise settlement of the disputes then existing between the parties, which sufficiently appears from the writing in evidence.

Moreover, we are of the opinion that Henry A. Mix, who acted for Eugene S. Pike and whose name was on the Pike office in the building as agent or manager, who had been in the employ of Pike for more than ten years, who personally made the leases on behalf of Pike, and with whom defendant transacted all his business as tenant in the Mentor building, was the agent of Pike clothed with sufficient authority to bind him.

There is no merit in any of plaintiffs' contentions, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

as not specifically mentioned in this writing, still must be meant by the words "for the full term from July 1, 1917, to July 1, 1918," as a matter of fact the lease dated August 14, 1914, is a matter of construction in the light of all the surrounding circumstances. At the time this writing was made the rent for March and April was due. The amount of the rent payable under the new lease is there set out as something less than the rent for the past one year. It is undoubtedly true that the intention of the parties was clearly expressed in this writing, and from all the evidence it is clear that the March and April rent was waived in consideration of a release for damages suffered by the tenant of the landlord. It is not necessary to state the time when in the lease. In the light of the admitted facts it is not to be doubted that the writing referring to full payment of rent from July 1, 1917, was intended to exclude the liability for the March and April rent, which rent was paid by the tenant of defendant's claim for damages. The rent was therefore paid in virtue of a compromise settlement of the dispute then existing between the parties, which settlement appears from the writing in evidence.

Moreover, we state the opinion that Henry A. Cox, who acted for the plaintiff, was not on the date of the writing in the building as agent of the plaintiff, and had been in the employ of the defendant for some time. It is also stated that the defendant furnished all his business as agent in the building, and was aware of the plaintiff's also employment for building, and was aware of the plaintiff's also employment for building.

There is no dispute in any of plaintiff's witnesses, and the judgment of the Municipal Court is affirmed.

206 - 24129

ISAAC E. CLASEMAN,
Appellee,

vs.

RICHARD W. FARMER CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 521

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Upon trial by the court plaintiff had judgment for \$35 from which defendant appeals.

The statement of claim set forth that there was due plaintiff the sum of \$35, wages for the week ending December 1, 1917; that he had been working as a cutter for the defendant corporation, which agreed to pay him the aforesaid sum weekly for such services. Plaintiff testified that he was employed by Richard W. Farmer, president of defendant, at its place of business, 515 South Fifth avenue, where defendant's name appeared on the door of the premises, and had been paid by checks of the Farmer Co.; that on Wednesday, November 28th, the foreman informed him that he had no further work for him; that he reported for duty on the remaining work days of that week but each time was told that there was nothing further for him to do; that he later made demand on Mr. Farmer for his wages and payment was refused.

Defendant's only witness was the bookkeeper at its place of business 16 West Jackson boulevard. It was sought to show by his testimony that the name of plaintiff did not appear on the books of the company as an employe, but objection to this line of questioning was sustained. He testified that the corporation had no more than one

ISAC T. LAMBERT,
Appellee,
vs.
RICHARD W. TAYLOR CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 A. 521

MR. JUSTICE NEWMAN DELIVERED THE OPINION OF THE COURT.

Upon trial by the court plaintiff had judgment

for \$55 from which defendant appeals.

The statement of claim set forth that there was

due plaintiff the sum of \$50, wages for the week ending

December 1, 1917; that he had been working as a cutter

for the defendant corporation, which agreed to pay him the

amount of one week's pay for such services. Plaintiff testi-

fied that he was employed by Richard W. Taylor, president

of defendant, at its place of business, 815 South Fifth

avenue, where defendant's name appeared on the door of the

premises, and had been paid by checks of the Taylor Co.;

that on Wednesday, November 28th, the foreman informed him

that he had no further work for him; that he reported for

duty on the following work days of that week and each time

was told that there was nothing further for him to do; that

he later made demand on Mr. Taylor for his wages and payment

was refused.

Defendant's only witness was the foreman at

its place of business he sent Jackson Densford. It was

sought to show by his testimony that the name of plaintiff

did not appear on the books of the company as an employee,

but objection to this line of questioning was sustained.

He testified that the corporation had no more than one

place of business in Chicago, and that it was not engaged in business at 515 S. Fifth avenue. To the question if it had a place of business outside of 16 W. Jackson blvd. would he as bookkeeper know of it, objection was also sustained. He further testified that he had drawn Farmer Co. checks payable to plaintiff, but was not permitted to state what the consideration for these checks was.

Defendant's counsel then made offer of proof which he stated would show that the place of business where plaintiff had been employed was not owned, operated or controlled by defendant, but that defendant had a contract with the parties at that address for the manufacture of certain clothing, etc.; that the checks referred to were made out for the use of the owners of such other business and were merely advances on orders placed by the company with such parties, - which offer was refused. Counsel for defendant, claiming to have been taken by surprise, then requested a continuance of 10 or 15 minutes so that he might bring in Mr. Farmer and the foreman of the business on Fifth avenue for the purpose of rebutting the testimony of plaintiff, but the court denied the request.

These rulings on evidence and on the motion for continuance are here complained of as error. The reason given by the court for the denial of a continuance, to the effect that the parties had been waiting all morning for trial and that it was counsel's place to have his witnesses in court and ready for hearing, was, we think, sound and the ruling entirely proper. While some of the evidence offered and refused may have been admissible, its rejection amounted to no more than harmless error. Statements by the bookkeeper as to working arrangements between

place of business in Chicago, and that it was not engaged in business at 215 N. Fifth Avenue. To the question if it had a place of business outside of 16 N. Jackson Blvd., would he as bookkeeper know of it, collection was not admitted. He further testified that he had drawn former Co. checks not able to identify, but was not permitted to state what the consideration for these checks was.

Defendant's counsel then made offer of proof which he stated would show that the place of business where Plaintiff had been employed was not owned, operated or controlled by defendant, but that defendant had a contract with the parties at that address for the manufacture of certain clothing, etc.; that the checks referred to were made out for the use of the owners of such other business and were merely advances on orders placed by said company with such parties - said offer was refused. Counsel for defendant claiming to have been taken by surprise, then requested a continuance of 1 or 15 minutes so that he might call in Mr. Wilson and the foreman of the business at Fifth Avenue for the purpose of rebutting the testimony of Plaintiff, but the court denied the request.

These rulings on evidence and on the motion for continuance are here complained of as error. The reason given by the court for the denial of a continuance, to the effect that the parties had been within all during for trial and that it was counsel's duty to have his witnesses in court and ready for hearing, was, we think, sound and the ruling entirely proper. Still none of the evidence offered and refused may have been admissible, its rejection amounted to no more than harmless error. It is noted by the bookkeeper as an acting witness between

the Farmer Co. and the establishment where plaintiff had worked, even if admitted could not be weighed against the uncontradicted statement of plaintiff that he had been employed by Farmer, as head of the defendant corporation, who had agreed to pay him the sum claimed per week, and that he had actually been paid by checks drawn against the account of defendant.

We hold that the judgment was right and it is affirmed.

AFFIRMED.

the latter Co. and the establishment where plaintiff had worked, even if admitted could not be relied against the uncontroverted statement of plaintiff that he had been employed by Turner, an agent of the defendant corporation, who had agreed to pay him the sum claimed for work, and that he had actually been paid by checks drawn against the account of defendant.

It is held that the judgment was right and it is

affirmed.

APPEAL.

235 - 24160

MRS. W. N. MANNING,
Appellee,

vs.

THE TOBEY FURNITURE CO.,
a corporation,
Appellant.

Appeal from

Municipal Court
of Chicago.

211 I.A. 522

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal Court in favor of plaintiff, had upon a jury trial of a fourth class action.

The abstract here filed in referring to the result of the hearing simply notes the following: "Verdict of jury. * * Judgment on the verdict." What the nature of the verdict and judgment was is not shown, and could be determined by us only through an examination of the record. As has been repeatedly held, we will not search the record to discover grounds for reversal.

DeLong v. Hruby, 203 Ill. App. 206; People v. Shapiro, ibid. 292; Barber v. Mellish-Hayward Co., No. 23468 this court, opinion filed January 28, 1918, and cases there cited.

For the failure of defendant to present properly his appeal the judgment of the Municipal Court is affirmed.

AFFIRMED.

Appellant, THE TERRY FURNITURE CO.,
a corporation,
vs.
Appellee, MRS. W. W. HANNING,
Appeal from Municipal Court of Chicago.

311 A. 338

MR. JUSTICE MCKENNEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal Court in favor of plaintiff, had upon a jury trial of a fourth class action.

The abstract here filed in referring to the result of the hearing simply notes the following: "Verdict of jury. * * * Judgment on the verdict." What the nature of the verdict and judgment was is not shown, and could be determined by us only through an examination of the record. As has been repeatedly held, we will not search the record to discover grounds for reversal. DeLong v. Harty, 303 Ill. App. 308; People v. Shapiro, 303 Ill. App. 308; Barber v. Mellich-Hayward Co., No. 33468. This court, opinion filed January 28, 1918, and cases there cited.

For the failure of defendant to present properly his appeal the judgment of the Municipal Court is affirmed.

AFFIRMED.

323 - 24250

FRANK W. STEWART,
Appellee,

vs.

L. WILSON et al.

WILLIAM W. LINK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 523

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff having brought suit in replevin for a quantity of tire holders, upon trial had judgment from which defendant appeals.

Plaintiff was in the automobile supply business, and tire holders seem to be small metal devices for holding extra tires on automobiles, and were manufactured by a Mr. L. Wilson. Plaintiff made a contract with Wilson for a supply of the tire holders. Part of the process of manufacturing was enameling, and this was done by the defendant Link under an arrangement between him and Wilson. The holders taken under the replevin writ were in the possession of Link; some of them he had enameled and claimed a lien for the amount of his labor upon these. The court found that he was entitled to this, and the amount was afterwards paid into court by the plaintiff. The propriety of this is not questioned. Defendant, however, claimed that he was entitled to possession not only of these holders but some 900 more, all of which he claimed were held by him to secure a general indebtedness due him from Wilson not connected with the contract between Stewart and Wilson. That the tire holders were so pledged is not in dispute, but Link's right thereto depends upon Wilson's title, for if Stewart and not Wilson owned the articles Wilson's pledge

CHICAGO, ILL. 1911

883 I.A. 228

THE - CHARGE
THAT THE DEFENDANT
WAS
I. WILSON OF AL.
WILLIAM F. LIND
APPEARING

THE COURT NOW READY TO RECEIVE THE EVIDENCE OF THE GOVERNMENT.
The defendant having been sworn, the witness was called for a
quantity of five soldiers, who were called and answered from which
defendant appeared.
The witness was in the defendant's supply company,
and the defendant seems to be well known to the witness.
The witness was in the defendant's supply company, and was
I. Wilson. The witness made a contract with Wilson for a quantity
of five soldiers. Part of the proceeds of the contract
was paid, and this was done by the defendant's bank
under an arrangement between him and Wilson. The witness
under the receipt which was in the possession of the witness;
of whom he had received and returned a receipt for the amount of
his order upon the bank. The court found that he was entitled
to this, and the amount was afterwards paid into court by the
defendant. The property of this is not questioned. The
defendant, however, claims that he was entitled to possession not
only of these soldiers but some two more, all of which he
claimed were held by him as security for a general indebtedness due
him from Wilson and connected with the contract between them
and Wilson. That the five soldiers were so placed is not in
dispute, but the witness claims to have seen Wilson's receipt
for it, and that the witness saw the receipt when Wilson's pledge

of these to Link would be futile. The controversy therefore narrows to the question as to whether under the facts, which do not seem to be substantially in dispute, the tire holders in question belonged to Stewart or Wilson.

The original contract between Stewart and Wilson is evidenced by writing dated October 17, 1916, which is a simple agreement for the purchase by Stewart of rear tire holders for Ford cars as per sample. Under this contract Wilson was to furnish both the steel and labor necessary. It seems that Wilson had little capital, and Stewart for a time advanced money to him to buy material and for labor and other expenses. In December, by mutual agreement and for sufficient reasons, the contract was changed so that Stewart ceased furnishing money to Wilson to buy steel and bought the steel himself and had it shipped to Wilson to be made up into tire holders. In order to keep track of the matter Stewart charged the price paid for the steel to Wilson and credited against this the full amount he had agreed to pay Wilson per holder. Wilson never kept any account in which he credited Stewart for moneys advanced for any of the steel. We have considered the correspondence and the verbal testimony of both Stewart and Wilson, and are of the opinion that the court was correct in concluding that the steel belonged to Stewart. Defendant's counsel seeks to draw a contrary conclusion from Stewart's method of bookkeeping. This, however, is not conclusive against him. It was desirable for Stewart to keep an account of the amount of steel which he sent to Wilson, and it would seem to be the proper thing that entries of this should be made in Wilson's account. Statements were made by both parties tending to show that in their opinion the steel was Stewart's and not Wilson's. Wilson

of these to link would be futile. The controversy therefore
narrows to the question as to whether under the facts,
which do not seem to be substantially in dispute, the title
holders in question referred to Stewart or Allison.

The original contract between Stewart and Allison

was as evidenced by writing dated December 17, 1912, which

is a single agreement for the purchase by Stewart of from

five holders for four lots at per acre. Under this con-

tract Allison was to furnish both the steel and labor neces-

sary. It seems that Allison had little capital, and Stewart

for a time advanced money to him to buy material and the in-

ter and other expenses. In December, by mutual agreement and

for sufficient reasons, the contract was changed so that Stewart

was to furnish the steel and Allison to buy steel and bought

the steel himself and had it shipped to Allison to be made up

into five holders. In order to keep track of the matter

Stewart charged the price paid for steel to Allison and

credited against this the bill received and was asked to pay

Allison per holder. Allison never kept any account of what he

credited Stewart for money advanced for any of the steel.

To have considered the correspondence and the various testi-

mony of both Stewart and Allison, and also of the opinion that

the court was correct in concluding that the steel belonged

to Stewart. Defendant's counsel seems to draw a contrary

conclusion from Stewart's method of bookkeeping. This,

however, is not conclusive against him. It was reasonable for

Stewart to keep an account of the money he loaned which he

sent to Allison, and it would seem to be the proper thing that

was done. It is not to be made in Allison's account. There-

fore, the fact that in their

opinion the steel was Stewart's and not Allison's. Allison

specifically admitted this, saying at one time to Stewart, "You can sell your steel for more than you paid for it." Wilson testifies in substance that when Stewart had suggested that he was getting too much money involved he, Wilson, had advised him to continue for the reason that the steel Stewart had bought had increased in value and that Stewart could sell it at any time at a profit. Other similar statements appear in the record, all of which lead inevitably to the conclusion that both Stewart and Wilson treated the steel as belonging to Stewart. We do not think there is anything in the letter of December 19, 1916, written by Stewart to Wilson inconsistent with this position. It was simply a caution to Wilson not to have Stewart buy more steel than was actually required, and a warning that if Wilson should have Stewart buy more than was necessary for the manufacture of the tire holders Wilson would be charged with this excess.

We cannot consider as changing the relations of the parties what was said by Wilson after they arrived at the stage of disagreement; we must adopt the construction placed upon their contract while the parties were in agreement and working in accord.

The fact that the steel had been made into tire holders under the contract does not deprive plaintiff of his right of possession. Among the cases so holding, upon facts essentially similar to those in the instant case, are First National Bank of Elgin v. Schween, 127 Ill. 573; McCrorey v. Hamilton, 39 Ill. App. 490; Loneragan v. Stewart, 55 Ill. 44.

If as between Stewart and Wilson, Stewart owned these articles, it follows that Wilson could make no pledge of them to Link to secure his indebtedness. This is in accordance

specifically omitted this, saying at one time to Stewart,

"You can sell your steel for more than you paid for it."

Wilson testified in substance that after Stewart had suggested

that he was getting too much money involved in Wilson, had

advised him to continue for the reason that the steel Stewart

had bought had increased in value and that Stewart could sell

it at any time at a profit. Other similar statements appear

in the record, all of which tend inevitably to the conclusion

that both Stewart and Wilson treated the steel as belonging

to Stewart. We do not think there is anything in the latter

of December 12, 1918, written by Stewart to Wilson inconsistent

with this position. It was simply a caution to Wilson not to

have Stewart buy more steel than was actually required, and

a warning that if Wilson should have Stewart buy more than

was necessary for the manufacture of the tire holders Wilson

would be charged with this excess.

We cannot consider as changing the relations of

the parties what was said by Wilson after they arrived at the

stage of disbursement; we must adopt the construction placed

upon their contact while the parties were in agreement and

working in accord.

The fact that the steel had been made into tire

holders under the contract does not deprive plaintiff of his

right of possession. Among the cases on holding, upon facts

essentially similar to those in the instant case, are First

National Bank of India v. London, 107 Ill. 635; Murray v.

London, 38 Ill. App. 400; Roberts v. Stewart, 55 Ill. 44.

If as between Stewart and Wilson, Stewart owned

these articles, it follows that Wilson could make no pledge of

them so far as to secure his indebtedness. This is in accordance

with the holding in First National Bank of Elgin v. Schween, 127 Ill. 573; Murton v. Curves, 40 Ill. 320; Montgomery Ward & Co. v. American Trust & Savings Bank, 71 Ill. App. 20; Ashland Block Association v. Thompson Co., 94 Ill. App. 501.

Holding as we do that under the facts Stewart was the owner of the articles replevied, and applying the law as stated in the cases cited, we are of the opinion that the judgment of the trial court was right and it is affirmed.

AFFIRMED.

with the holding in United States v. Brown,
159 F.2d 575; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

Nothing as to that under the United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

ATTORNEY

The court in United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

The court in United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

The court in United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

The court in United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011; United States v. Brown, 221 F.2d 1011.

EDWARD GIRZUS, a minor, by
John Girzuz, his next friend,

Appellee.

vs.

SIMON VAN ETTEN, HENRY VAN ETTEN
and CATHOLIC BISHOP OF CHICAGO.

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

211 I.A. 533

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

We have this day filed an opinion in the case
of Edward Girzuz, a minor, by John Girzuz, his next
friend, v. Simon Van Eten, Henry Van Eten and Catholic
Bishop of Chicago. General No. 23598, and what we have
there said is controlling here. For the reasons there
given, the judgment of the Circuit Court of Cook County
is affirmed.

AFFIRMED.

6824

1918 - 1919

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C.
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
WASHINGTON, D. C.

211 A. 588

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C.
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
WASHINGTON, D. C.

RECEIVED

4284

564 - 23909

FRANK LOPATA,

Appellee,

vs.

JOHN JAROS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 546

MR. PRESIDING JUSTICE O'SONNOR delivered the opinion of the court.

Frank Lopata brought suit in the Municipal Court of Chicago against John Jaros, to recover \$480.86, alleged to be due for goods sold and delivered. Plaintiff's statement of claim set forth in detail a running account with defendant, commencing August 20, 1915, and continuing until May 1, 1916, and showing a balance of \$480.86 due from defendant to plaintiff. Defendant did not deny the correctness of any of the items, but filed an affidavit of merits alleging that on June 10, 1916, he and plaintiff had a settlement of all claims between them; that he paid plaintiff \$325 in cash, and that this, together with a credit of \$130 which plaintiff allowed him, was settlement in full. The case was tried before the court without a jury, and a finding and judgment was entered in favor of plaintiff for the amount of his claim.

The only question raised on this appeal is the sufficiency of the evidence to support the judgment in favor of plaintiff. Defendant contends that the judgment should be reversed because the finding of the trial court is against the weight of the evidence.

See - 2200

Black Report

Application

Yes

From 1910

Application

UNITED STATES
DISTRICT COURT
OF CHICAGO

2111 A. 246

THE RECEIVING JUSTICE OF PEACE delivered the

opinion of the court.

Frank Lohman brought suit in the Municipal

Court of Chicago against John Jones, to recover \$10.00.

Alleged to be due for goods sold and delivered. Plaintiff's

statement of claim was taken in default of answer and returned

with judgment, recommending against \$10.00, and returning

until May 1, 1910, and showing a balance of \$10.00 due

from defendant to plaintiff. Defendant did not deny the

correctness of any of the items, but filed an affidavit

of merits alleging that on June 10, 1910, he and plaintiff

settled all claims between them; that

he paid plaintiff \$10.00 in cash, and that since, defendant

gave a credit of \$10.00 which plaintiff allowed him, was

settled in full. The case was tried before the court

without a jury, and a finding and judgment was entered

in favor of plaintiff for the amount of his claim.

The only question raised on this report is the

correctness of the evidence in support of the judgment in favor

of plaintiff. Plaintiff contends that the judgment should

be reversed because the finding of the trial court is against

the weight of the evidence.

The defendant having failed to dispute the correctness of plaintiff's claim, assumed the burden of proving payment. He testified that he met plaintiff on Saturday afternoon, between twelve and one o'clock, June 10, 1916, in a certain saloon in Chicago, and there paid him \$325 in cash; that plaintiff allowed him a credit for labor and material furnished; that he cashed a check on the day in question at the Lawndale State Bank for \$1,500, and had this amount of money with him when he paid plaintiff; that it was his pay day and he was paying off his men; that his pay roll on that day was \$800; that he asked plaintiff for a receipt and plaintiff promised to mail him one, but stated: "You got enough witness if I don't mail you receipt." Defendant's story was corroborated by three other witnesses, who testified they were present and witnessed the alleged settlement. All of defendant's witnesses testified positively that the transaction took place on the afternoon of June 10, 1916.

Plaintiff testified that he was not in the saloon in question on June 10, 1916; that he went to Gary, Illinois, on that date; that he left Chicago about eleven o'clock in the morning and reached Gary about seven o'clock in the evening. In this plaintiff was corroborated by two other witnesses, who testified that they accompanied plaintiff to Gary, Illinois, on the day in question; that they left Chicago about 11:30 in the morning and arrived at Gary in the evening. An employee of the Lawndale State Bank testified on behalf of the plaintiff that the books of the bank did not show any check cashed by defendant on the date in question.

...the defendant having failed to dispute the
evidence of Plaintiff's claim, and the reason
of proving payment. The defendant had no claim
left on defendant's account, between twelve and one
o'clock, June 10, 1916, in a certain place in Chicago,
and the defendant had him there; that Plaintiff allowed
him a check for \$100 and material furnished; that he
contacted a man on the day in question at the defendant's
store bank for \$1,500, and had this amount of money
with him when he paid Plaintiff; that it was the day
that day was \$100; that he asked Plaintiff for a receipt
and Plaintiff promised to call him on, but did not;
"I am not enough witness to I am not a witness."
Defendant's story was corroborated by three other wit-
nesses, who testified they were present and witnessed
the alleged payment. All of defendant's witnesses
testified positively that the transaction took place
on the afternoon of June 10, 1916.
Plaintiff testified that he was not in the
place in question on June 10, 1916; that he went to
Gary, Illinois, on that date; that he left Chicago
about eleven o'clock in the morning and reached Gary
about seven o'clock in the evening. In this Plaintiff
was corroborated by two other witnesses, who testified
that they accompanied Plaintiff to Gary, Illinois, on
the day in question; that they left Chicago about
11:30 in the morning and arrived at Gary in the evening.
An employee of the Rock Island State Bank testified on
behalf of the Plaintiff that the books of the bank
did not show any check issued by defendant on the date

It is apparent from the foregoing statement of the evidence that the determination of the question here involved was peculiarly within the province of the trial court, who saw and heard the witnesses and was in a much better position to judge of their credibility than we are, and after a careful review of the record, we cannot say that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

It is important from the foregoing statement of the witness that the deposition of the witness here involved was procured after the review of the trial court, and was made by the witness and not in a court before review to judge of their credibility, and so that, and after a careful review of the record, we must say that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the trial court is affirmed.
is affirmed.

ADJUDICATED.

- 24382

CALISTA PIERCE,

Appellee.

vs.

EUGENE C. PIERCE, et al.

Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

211 I.A. 547

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Calista Pierce filed her bill of complaint, March 12, 1918, in the Superior Court of Cook County, against Eugene G. Pierce, Mary P. Goodison, George Allan Goodison, her husband, George B. Williams and Charles Hudson, seeking to set aside an oral contract for the transfer of personal property, entered into between the complainant and the defendants Eugene G. Pierce and others, and praying for a temporary injunction to prevent the defendants from transferring, assigning, encumbering, or disposing of shares of stock in a certain corporation, and from receiving dividends thereon, and that a receiver be appointed to take and hold the certificates of stock pending a hearing. On the same day an order was entered awarding a writ of injunction as prayed for. The writ was served on the next day, March 13th, and an order was entered appointing a receiver of the certificates of stock, and defendants were ordered to forthwith turn them over to such receiver until the further order of court. From this order, the defendants Pierce and Williams prosecute

2111.A.347

INTERLOCUTORY
MOTION FOR
RECEIVED COURT,
COOK COUNTY.

CAUSE NO. 12345
IN RE
Estate of JAMES A. JONES, et al.
Appellants.

THE PETITIONING PARTIES OF COOK COUNTY, ILLINOIS, AND
OPINION OF THE COURT.

WHEREAS James Jones filed his bill of complaint,
March 15, 1914, in the Superior Court of Cook County,
against James G. Jones, Mary E. Goodison, George
Allen Goodison, her husband, George E. Williams and
Charles Wilson, seeking to set aside an oral contract
for the transfer of personal property, entered into
between the complainant and the defendants James G.
Jones and others, and praying for a temporary injunc-
tion to prevent the defendants from transferring, as-
signing, encumbering, or disposing of assets of estate
in a certain corporation, and from receiving dividends
thereon, and that a receiver be appointed to take and
hold the assets of said estate pending a hearing. On
the same day an order was entered appointing a writ of
injunction as prayed for. The writ was served on the
next day, March 15th, and on said day entered against
the defendant of the corporation of stock, and return-
ing were placed in forthwith from that day to such
receiver until the further order of court. And this
order, the defendants James and William Goodison

this appeal.

Complaint is made that the appointment of the receiver was contrary to the rules of the Superior Court, which provide that where no attorney or solicitor has appeared of record, notice shall be given to the opposite party at least twenty-four hours before the motion is heard, and that copies of all papers must be served with the notice; that all motions shall be in writing; and it is argued that none of these requirements was observed in the instant case; that one of the appellant defendants was served but ten minutes before the motion was heard, and that notice was claimed to have been served on the defendant Hudson by leaving a copy of his notice at his office after four o'clock on the evening of the day before the motion was heard.

The record discloses that appellants were represented by counsel on the hearing of the motion for the appointment of a receiver; that counsel entered what they term a special appearance for the sole purpose of resisting the appointment of the receiver. The rules of the Superior Court, in addition to what has been stated, provide that where a motion is made before default day and the defendants have not appeared personally or by attorney, the defendants shall be personally served at least one day before the motion is made, if it is practicable to do so and not otherwise determined by the court because of emergency. Appellants were represented by counsel before the chancellor on the application for the appointment of a receiver, and while twenty-four hours notice had not been given, yet we think, under the rules, the court was fully warranted

the appeal.

Continuing it was said that the appointment of the receiver was contrary to the rules of the Superior Court, which provide that where no necessity or justification appears of record, notice shall be given to the opposite party at least twenty-four hours before the action is heard, and that copies of all papers must be served with the notice; that all matters shall be in writing; and it is argued that none of these requirements was observed in the instant case; that one of the appellant defendants was served but no minutes before the action was heard, and that notice was claimed to have been served on the defendant husband by leaving a copy of his motion at his office after hours, on the evening of the day before the action was heard.

The record discloses that appellants were represented by counsel on the hearing of the motion for the appointment of a receiver; that counsel advised that they were a special appearance for the sole purpose of contesting the appointment of the receiver. The rules of the Superior Court, in addition to what has been stated, provide that where a motion is made before default has been taken, the motion shall be presented personally or by attorney, the date when it shall be personally served at least one day before the action is heard, it is inadvisable to do so and not otherwise determined by the court because of emergency. Appellants were represented by counsel before the chancellor on the application for the appointment of a receiver, and while twenty-four hours notice was not then given, yet to think, under the rules, the court was fully warranted

in holding the notice sufficient, for in matters of emergency the rule dispenses with notice, and we do not understand, as counsel for appellants argue, that in such case there must be a finding of record by the trial judge to that effect.

It is also contended that there is no equity in the bill. No complaint is made of the awarding of the injunction writ, whereby the defendants were restrained from transferring or encumbering the stock involved, and in fact appellants argue that under the circumstances this afforded sufficient protection without the appointment of the receiver; and in this connection it is stated that the defendants enjoined are responsible persons, and that "it is not to be presumed that responsible or even reputable parties are going to violate an injunction served on them." This argument assumes that the injunction was properly awarded, and therefore further assumes the sufficiency of the bill. In any event, we think the bill is sufficient. It alleges in substance that complainant inherited the business from her deceased husband, which she afterwards incorporated; that she transferred the certificates of stock to certain of the defendants in consideration of their oral promise to allow complainant sufficient money to support herself during her life; that such defendants further agreed not to transfer any of the stock during her lifetime; that in violation of this agreement the defendant Pierce transferred some of the stock and threatened to transfer more of it, and refused complainant the support promised, although demanded by her. These allegations, we think, made a prima facie case. From what we have said, it follows that the contention of appellants that there was

in holding the notice sufficient, for in matters of emergency the rule dispenses with notice, and we do not understand, as counsel for appellants argue, that in such cases there must be a finding of record by the trial judge to that effect.

It is also contended that there is no equity in the bill. No complaint is made of the wording of the injunction writ, and by the defendants were restricted from transferring or encumbering the stock involved. It is said appellants argue that under the circumstances this afforded sufficient protection without the appointment of the receiver; and in this connection it is stated that the defendant enjoined the responsible persons, and that it is not to be presumed that responsible persons would violate an injunction. This argument assumes that the injunction was properly awarded, and therefore further assumes that the bill is in any event, as filed, the bill is sufficient. It alleges that appellants had knowledge of the facts from her deposed husband, which was incorporated into the bill, and transferred the same to the court as certain of the witnesses in consideration of their oral promise to allow complainant sufficient money to support herself during her life; that such defendant further agreed not to transfer any of the stock during her lifetime; that in violation of this agreement the defendant's stock was transferred some of the stock and threatened to transfer more of it, and refused to comply with the request, although demanded by her. These allegations, we think, make a prima facie case. From what we have said, it follows that the reservation of appellants that there was

no breach alleged is without merit.

It is also contended that the order appointing a receiver is improper, for the reason that the corporation was not made a party defendant. The stockholders and officers are made defendants. The receiver was not authorized to take possession of any of the corporate property, but only to hold the certificate of stock. A corporation is in no way interested as to what individuals hold the stock, and we think it was, therefore, unnecessary to join it as a party. Moreover, if it should develop on the hearing that the corporation were a necessary party, the proper amendment might be made.

The receiver in this case is more in the nature of a custodian. The only power given him is to receive the certificates of stock and hold the same until the further order of court. The only purpose of this is to render the injunction effective to maintain the status quo. In these circumstances, we think the appointment of the receiver was warranted. West Side Hospital v. Steele, 124 Ill. App. 534.

The order of the Superior Court of Cook County is affirmed.

AFFIRMED.

no person alleged to be a member of the same.

It is also suggested that the person appearing in the receiver is improper, for the reason that the person from whom the money was received was not a party to the transaction. The receiver was not authorized to take possession of any of the corporate property, but only to hold the certificate of stock. A corporation is in no way interested in the individual who holds the stock, and we think it best, therefore, to leave it as a party. However, if it should desire to have the stock, the corporation must be a necessary party, the proper remedy being in equity.

The receiver is also asked to be removed from the office of the receiver. The only reason given for the removal is that the receiver is not a party to the transaction. The only purpose of this is to remove the receiver from the office. The receiver is not a party to the transaction, and we think the removal of the receiver is proper. However, the receiver is not a party to the transaction, and we think the removal of the receiver is proper. The order of the receiver of the County is allowed.

ORDER.

245 - 23590

STRESENREUTER BROTHERS,
a corporation, Appellee.

vs.

HENRY A. KNOTT,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

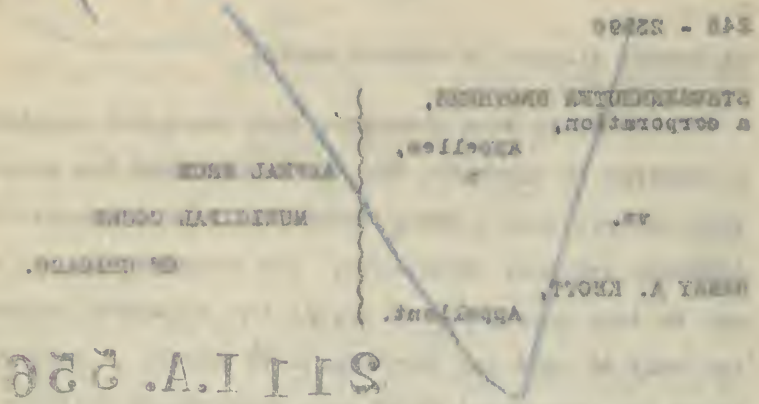
211 I.A. 556

MR. JUSTICE TAYLOR delivered the opinion of the court.

The defendant, Henry A. Knott, having given the plaintiff a promissory note in the sum of \$1754.25 as the final payment for remodeling a building owned by the defendant, the plaintiff brought suit and recovered a verdict and judgment in the sum of \$1996.91. This appeal is taken therefrom.

On July 16, 1914, the plaintiff and the defendant entered into a written contract whereby the plaintiff agreed to "furnish all the material and labor necessary for the masonry and carpentry for alterations and additions to building at the corner of Lake and Jefferson streets, Chicago, for said owner as shown on plans and described in the specifications * * * and to do to the satisfaction of the architects everything required of him by the specifications or drawings." Plaintiff, at the same time, had a contract for the erection and construction of a new two-story building which was to be built immediately west of the building to be remodeled, which latter was located at the north-west corner of Lake and Jefferson streets. The contract

4287



211 I.A. 556

THE JUSTICE TAXED delivered the opinion of the court.

The defendant, Henry A. Knott, having given the plaintiff a promissory note in the sum of \$1754.00 as the final payment for remodeling a building owned by the defendant, the plaintiff brought suit and recovered a verdict and judgment in the sum of \$1754.00. This appeal is taken therefrom.

On July 16, 1914, the plaintiff and the defendant entered into a written contract whereby the

plaintiff agreed to "furnish all the material and labor necessary for the masonry and carpentry for alterations and additions to building at the corner of Lake and Jefferson streets, Chicago, for said work as shown on plans and described in the specifications" * * * and to do to the satisfaction of the architect everything required of him by the specifications or drawings."

Plaintiff, at the same time, had a contract for the erection and construction of a new two-story building which was to be built immediately west of the building to be remodelled, which latter was located at the north-west corner of Lake and Jefferson streets. The contract

provides for the alterations and remodeling of the old building for \$16,729.00, payable "only upon certificates issued by the architects", etc. It was provided in Article 4 of the contract that "the specifications and drawings with all notations now thereon are, together with the agreement, the documents forming the contract * * * that said owner and contractor * * * agree that they will abide by and promptly and fully carry out all decisions of the architects given thereunder." The specifications for carpenter work provided (56), "The contractor should wreck the floors of the old building and remove all the material of same from the premises, after which the new floor construction will be put in place as shown on the drawings."

After the alterations were made and the work of remodeling completed by the plaintiff; and after the last architect's certificate had been issued and paid for, in part, by the note in question, it is claimed by the defendant, the owner, that he discovered, for the first time, that the height of the second story averaged $5/8$ of an inch and the height of the third story, $2-5/8$ of an inch less than called for by the plans. The defendant then refused to pay the note in question and claims, in his affidavit of merits, "that by reason of the failure on the part of the plaintiff to perform and live up to its agreement, defendant has lost large sums of rent; * * * that by reason of the failure of the plaintiff to perform its work in accordance with the plans and specifications, said building was permanently damaged * * * in the sum of , to wit, ten thousand dollars."

provided for the alterations and remodeling of the old building for \$16,750.00, payable "only upon certificates issued by the architect", etc. It was provided in Article 4 of the contract that "the specifications and drawings with all notations now on hand are, together with the agreement, the documents forming the contract * * * that said owner and contractor * * * agree that they will abide by and promptly and fully carry out all decisions of the architect given thereunder." The specifications for carpenter work provided (86), "The contractor should work the floors of the old building and remove all the material of same from the premises, after which the new floor construction will be put in place as shown on the drawings."

After the alterations were made and the work of remodeling completed by the plaintiff; and after the last architect's certificate had been issued and paid for, in part, by the note in question, it is claimed by the defendant, the owner, that he discovered, for the first time, that the height of the second story averaged 8'8" of an inch and the height of the third story, 8'5"8" of an inch less than called for by the plans. The defendant then refused to pay the note in question and claims, in his affidavit of merits, "that by reason of the failure on the part of the plaintiff to perform and live up to its agreement, defendant has lost large sums of rent; * * * that by reason of the failure of the plaintiff to perform its work in accordance with the plans and specifications, said building was permanently damaged * * * in the sum of, to wit, ten thousand dollars."

The evidence shows that the new building was all complete before work was begun altering and remodeling the old building; that the new building was constructed according to measurements given on the plans, and after the first story was finished it was found that the defendant's architects had made a mistake and that the second floor of the new building was approximately 18 inches higher than the second floor of the old building. Just how the architect's mistake occurred is not shown. As the result of that error, changes had to be made in the alterations of the old building. Those changes were agreed to by both plaintiff and the defendant, but the latter through his architect. It was agreed orally that the floors of the old building should be raised. Those changes were looked after, as far as the defendant was concerned, by one Dwight, the superintendent for the architects, Postle and Fischer. Dwight, as the architect Postle testified, looked after the details daily; and, referring to the floor changes arising from the mistake in the original plans, was supposed to look after them. The building itself is what is called a loft building, "just rough brick walls used for manufacturing purposes and all there is inside is joists overhead and no lath or plaster at all."

The space between the floor and ceiling of the new building was the same as was called for by the plans. In order to have the openings in the various floors of the old building as they should have been after the discrepancy in the foundation was discovered, it was necessary, in the language of the architect "to raise the whole business that much above the second floor." It is the theory of the plaintiff that after the mistake was discovered in the original plans, the second floor of the old building was

The evidence shows that the new building was all complete before work was begun exterior and remodeling the old building; that the new building was constructed according to measurements given on the plans, and after the first story was finished it was found that the defendant's architect had made a mistake and that the second floor of the new building was approximately 18 inches higher than the second floor of the old building. Just how the architect's mistake occurred is not shown. As the result of that error, changes had to be made in the alterations of the old building. Those changes were agreed to by both plaintiff and the defendant, but the latter through his architect. It was agreed orally that the floors of the old building should be raised. Those changes were looked after, as far as the defendant was concerned, by one Dwight, the superintendent for the architect, Hestie and Wischer. Dwight, as the architect's representative, looked after the details orally; and, referring to the floor changes arising from the mistake in the original plans, was supposed to look after them. The building itself is what is called a loft building, "just rough brick walls used for manufacturing purposes and all the inside is joists overhead and no lath or plaster at all."

The space between the floor and ceiling of the new building was the same as was called for by the plans. In order to leave the openings in the various floors of the old building as they should have been after the discrepancy in the foundation was discovered, it was necessary in the language of the architect who raised the joists "to put much above the second floor." It is the theory of the plaintiff that after the mistake was discovered in the original plans, the second floor of the old building was

18 inches below the second floor of the new building; that the architects' office was told about it; that the matter was talked over; that the plans, from time to time, were changed, owing to that original error made in the defendant's architects office; that not only did the second and third floors of the old building have to be raised, but the windows on the second and third floors also; that after they put in the third floor and it was found that the height from the floor to the roof was 18 inches less than the plans called for, it, the plaintiff, was given an order to put the additional brick work on the fourth floor; that the changes were made at the suggestion of and sanctioned by the defendant through his architect.

It is the theory of the defendant that, although admittedly an error was made in the plans in regard to the height of the floors in the old building, and as a result it became necessary to make certain changes in the alterations and remodeling of the old building not provided for in the original plans, yet it was the obligation of the plaintiff, as to the height of the space in each story, to follow the plans, and, although the defendant, through his architect, undertook to authorize certain changes to be made in the construction, and, as the original contract provided that "except when authorized in writing by the architect, the superintendent has no authority to add or deduct from the work called for under the contract or to order any changes therein", the defendant, having given no authority in writing as to changes in height of ceilings, was not bound thereby. The defendant lays much stress upon the provision that the authority for alterations must be in writing. The

18 inches below the second floor of the new building; that the architect's office was told about it; that the master was called over; that the plans, from time to time, were changed, owing to that original error made in the distance of the architect's office; that not only did the second and third floors of the old building have to be raised, but the windows on the second and third floors also; that after they put in the third floor and it was found that the height from the floor to the roof was 18 inches less than the plans called for, it, the plaintiff, was given an order to put the additional brick work on the fourth floor; that the changes were made at the suggestion of and sanctioned by the defendant through the architect.

It is the theory of the defendant that, although admittedly an error was made in the plans in regard to the height of the floors in the old building, and on a result it became necessary to make certain changes in the alterations and remodeling of the old building not provided for in the original plans, yet it was the obligation of the plaintiff, as to the height of the space in each story, to follow the plans, and, although the defendant, through its architect, undertook to authorize certain changes to be made in the construction, and, as the original contract provided, that "excepts when authorized in writing by the architect," the defendant has no authority to add or deduct from the work called for under the contract or to order any changes therein, the defendant, having given no authority in writing as to changes in height of ceilings, was not bound thereon. The defendant lays much stress upon the provision that the authority for alterations must be in writing. The

evidence shows, however, that, owing to the defendant's architects' error in the original plans, it became necessary to depart radically from the original plans themselves. Apparently no new plans were drawn; but the alterations and the remodeling went on as far as the elevation of the floors was concerned, and went on by reason of mutual oral understanding, and without complying with the provision in the contract that authority for alterations should be in writing. Under the circumstances we feel bound to assume that the parties, by their conduct, waived the necessity for written authority to make changes, and that the trial judge erred in excluding, as he did from time to time, evidence which was offered by the plaintiff to show that what was done as to changes, occurred with the definite sanction of the proper representative of the defendant. As to the difference in the height of the ceilings, it may be material or immaterial. There is testimony each way. Certainly an average discrepancy of $5/8$ of an inch in the height of the second story must be considered, under the circumstances, negligible. Of course, the $2-5/8$ inches in the third story is more substantial. The whole matter, however, was left to the jury and they have decided against the defendant. Counsel for the defendant complains of the refusal to give certain instructions. We have examined them and are of the opinion that it was not prejudicial error to refuse them.

It is also claimed by counsel for the defendant that the matter of damages should have been submitted to the architects for determination before suit was brought. We cannot agree thereto. The plaintiff simply brought suit upon a note which had been voluntarily given him by the defendant. That suit, he was entitled to begin and he made

evidence shows, however, that, owing to the defendant's architect's error in the original plans, it became necessary to depart radically from the original plans themselves. Apparently no new plans were drawn; but the alterations and the remodeling went on as far as the elevation of the floors was concerned, and went on by reason of mutual oral understanding, and without complying with the provision in the contract that authority for alterations should be in writing. Under the circumstances we feel bound to assume that the parties, by their conduct, waived the necessity for written authority to make changes, and that the trial judge erred in excluding, as he did from time to time, evidence which was offered by the plaintiff to show that what was done as to changes, occurred with the definite sanction of the proper representative of the defendant. As to the difference in the height of the ceilings, it may be material or immaterial. There is testimony each way. Certainly an average discrepancy of $5/8$ of an inch in the height of the second story must be considered, under the circumstances, negligible. Of course, the $2-5/8$ inches in the third story is more substantial. The whole matter, however, was left to the jury and they have decided against the defendant. Counsel for the defendant complains of the refusal to give certain instructions. We have examined them and are of the opinion that it was not prejudicial error to refuse them.

It is also claimed by counsel for the defendant that the matter of damages should have been submitted to the architect for determination before suit was brought. We cannot agree thereto. The plaintiff simply brought suit upon notes which had been voluntarily given him by the de-

out a prima facie case by simply introducing the note. The whole subject of damages arises only by reason of the defendant voluntarily making it a subject of litigation. Considerable of the briefs of defendant's counsel is devoted to the subject of improper conduct and remarks on the part of plaintiff's counsel. Inasmuch, however, as we are of the opinion that the evidence which was offered and ruled out and was the chief subject of the alleged improprieties, should have been admitted, it follows that the defendant has not suffered thereby.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

243 - 23593

HELEN MORROW,

Appellee,

vs.

BLAIR MCKENNA,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

4270
211 I.A. 566

MR. JUSTICE THOMSON delivered the opinion of the court.

Helen Morrow, the appellee, ^{Plaintiff} recovered a judgment by confession in the trial court ~~on a judgment note~~ against the defendant and two others, ^{on the note,} all three being the makers of the note. Some time later, the court granted the defendant leave to file his appearance and plead to the merits, and entered an order that the judgment was to stand as security. The defendant filed a plea of the general issue and two special pleas, one setting forth want of consideration, and the other, failure of consideration. With the pleadings in this condition, on motion duly made by the plaintiff, the case was placed on the short cause calendar. Some time after that was done, the defendant made a motion to strike the case from the short cause calendar on the ground that it was not at issue when it was placed upon that calendar, and was still not at issue at the time the motion was made. This motion was denied. Two days thereafter, the plaintiff filed a document, which he termed a similitur, This document ^{which} contained a paragraph which was a similitur to the plea of the general issue which the defendant had filed. This

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A copy of this report will be furnished to you.

against the defendant and two others, all three being

THE UNIVERSITY OF CHICAGO

Approved: the following I have to fill the application was

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1. What is the purpose of the study?

Printed by the Government Printer, Ottawa, Ontario, 1914.

10-11-68, 10-12-68, 10-13-68, 10-14-68, 10-15-68, 10-16-68, 10-17-68, 10-18-68, 10-19-68, 10-20-68, 10-21-68, 10-22-68, 10-23-68, 10-24-68, 10-25-68, 10-26-68, 10-27-68, 10-28-68, 10-29-68, 10-30-68, 10-31-68, 11-1-68, 11-2-68, 11-3-68, 11-4-68, 11-5-68, 11-6-68, 11-7-68, 11-8-68, 11-9-68, 11-10-68, 11-11-68, 11-12-68, 11-13-68, 11-14-68, 11-15-68, 11-16-68, 11-17-68, 11-18-68, 11-19-68, 11-20-68, 11-21-68, 11-22-68, 11-23-68, 11-24-68, 11-25-68, 11-26-68, 11-27-68, 11-28-68, 11-29-68, 11-30-68, 12-1-68, 12-2-68, 12-3-68, 12-4-68, 12-5-68, 12-6-68, 12-7-68, 12-8-68, 12-9-68, 12-10-68, 12-11-68, 12-12-68, 12-13-68, 12-14-68, 12-15-68, 12-16-68, 12-17-68, 12-18-68, 12-19-68, 12-20-68, 12-21-68, 12-22-68, 12-23-68, 12-24-68, 12-25-68, 12-26-68, 12-27-68, 12-28-68, 12-29-68, 12-30-68, 12-31-68, 1-1-69, 1-2-69, 1-3-69, 1-4-69, 1-5-69, 1-6-69, 1-7-69, 1-8-69, 1-9-69, 1-10-69, 1-11-69, 1-12-69, 1-13-69, 1-14-69, 1-15-69, 1-16-69, 1-17-69, 1-18-69, 1-19-69, 1-20-69, 1-21-69, 1-22-69, 1-23-69, 1-24-69, 1-25-69, 1-26-69, 1-27-69, 1-28-69, 1-29-69, 1-30-69, 1-31-69, 2-1-69, 2-2-69, 2-3-69, 2-4-69, 2-5-69, 2-6-69, 2-7-69, 2-8-69, 2-9-69, 2-10-69, 2-11-69, 2-12-69, 2-13-69, 2-14-69, 2-15-69, 2-16-69, 2-17-69, 2-18-69, 2-19-69, 2-20-69, 2-21-69, 2-22-69, 2-23-69, 2-24-69, 2-25-69, 2-26-69, 2-27-69, 2-28-69, 2-29-69, 2-30-69, 3-1-69, 3-2-69, 3-3-69, 3-4-69, 3-5-69, 3-6-69, 3-7-69, 3-8-69, 3-9-69, 3-10-69, 3-11-69, 3-12-69, 3-13-69, 3-14-69, 3-15-69, 3-16-69, 3-17-69, 3-18-69, 3-19-69, 3-20-69, 3-21-69, 3-22-69, 3-23-69, 3-24-69, 3-25-69, 3-26-69, 3-27-69, 3-28-69, 3-29-69, 3-30-69, 3-31-69, 4-1-69, 4-2-69, 4-3-69, 4-4-69, 4-5-69, 4-6-69, 4-7-69, 4-8-69, 4-9-69, 4-10-69, 4-11-69, 4-12-69, 4-13-69, 4-14-69, 4-15-69, 4-16-69, 4-17-69, 4-18-69, 4-19-69, 4-20-69, 4-21-69, 4-22-69, 4-23-69, 4-24-69, 4-25-69, 4-26-69, 4-27-69, 4-28-69, 4-29-69, 4-30-69, 5-1-69, 5-2-69, 5-3-69, 5-4-69, 5-5-69, 5-6-69, 5-7-69, 5-8-69, 5-9-69, 5-10-69, 5-11-69, 5-12-69, 5-13-69, 5-14-69, 5-15-69, 5-16-69, 5-17-69, 5-18-69, 5-19-69, 5-20-69, 5-21-69, 5-22-69, 5-23-69, 5-24-69, 5-25-69, 5-26-69, 5-27-69, 5-28-69, 5-29-69, 5-30-69, 5-31-69, 6-1-69, 6-2-69, 6-3-69, 6-4-69, 6-5-69, 6-6-69, 6-7-69, 6-8-69, 6-9-69, 6-10-69, 6-11-69, 6-12-69, 6-13-69, 6-14-69, 6-15-69, 6-16-69, 6-17-69, 6-18-69, 6-19-69, 6-20-69, 6-21-69, 6-22-69, 6-23-69, 6-24-69, 6-25-69, 6-26-69, 6-27-69, 6-28-69, 6-29-69, 6-30-69, 7-1-69, 7-2-69, 7-3-69, 7-4-69, 7-5-69, 7-6-69, 7-7-69, 7-8-69, 7-9-69, 7-10-69, 7-11-69, 7-12-69, 7-13-69, 7-14-69, 7-15-69, 7-16-69, 7-17-69, 7-18-69, 7-19-69, 7-20-69, 7-21-69, 7-22-69, 7-23-69, 7-24-69, 7-25-69, 7-26-69, 7-27-69, 7-28-69, 7-29-69, 7-30-69, 7-31-69, 8-1-69, 8-2-69, 8-3-69, 8-4-69, 8-5-69, 8-6-69, 8-7-69, 8-8-69, 8-9-69, 8-10-69, 8-11-69, 8-12-69, 8-13-69, 8-14-69, 8-15-69, 8-16-69, 8-17-69, 8-18-69, 8-19-69, 8-20-69, 8-21-69, 8-22-69, 8-23-69, 8-24-69, 8-25-69, 8-26-69, 8-27-69, 8-28-69, 8-29-69, 8-30-69, 8-31-69, 9-1-69, 9-2-69, 9-3-69, 9-4-69, 9-5-69, 9-6-69, 9-7-69, 9-8-69, 9-9-69, 9-10-69, 9-11-69, 9-12-69, 9-13-69, 9-14-69, 9-15-69, 9-16-69, 9-17-69, 9-18-69, 9-19-69, 9-20-69, 9-21-69, 9-22-69, 9-23-69, 9-24-69, 9-25-69, 9-26-69, 9-27-69, 9-28-69, 9-29-69, 9-30-69, 10-1-69, 10-2-69, 10-3-69, 10-4-69, 10-5-69, 10-6-69, 10-7-69, 10-8-69, 10-9-69, 10-10-69, 10-11-69, 10-12-69, 10-13-69, 10-14-69, 10-15-69, 10-16-69, 10-17-69, 10-18-69, 10-19-69, 10-20-69, 10-21-69, 10-22-69, 10-23-69, 10-24-69, 10-25-69, 10-26-69, 10-27-69, 10-28-69, 10-29-69, 10-30-69, 10-31-69, 11-1-69, 11-2-69, 11-3-69, 11-4-69, 11-5-69, 11-6-69, 11-7-69, 11-8-69, 11-9-69, 11-10-69, 11-11-69, 11-12-69, 11-13-69, 11-14-69, 11-15-69, 11-16-69, 11-17-69, 11-18-69, 11-19-69, 11-20-69, 11-21-69, 11-22-69, 11-23-69, 11-24-69, 11-25-69, 11-26-69, 11-27-69, 11-28-69, 11-29-69, 11-30-69, 12-1-69, 12-2-69, 12-3-69, 12-4-69, 12-5-69, 12-6-69, 12-7-69, 12-8-69, 12-9-69, 12-10-69, 12-11-69, 12-12-69, 12-13-69, 12-14-69, 12-15-69, 12-16-69, 12-17-69, 12-18-69, 12-19-69, 12-20-69, 12-21-69, 12-22-69, 12-23-69, 12-24-69, 12-25-69, 12-26-69, 12-27-69, 12-28-69, 12-29-69, 12-30-69, 12-31-69, 1-1-7

THE OF COURTESY TO YOU

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Based on the above information, it is recommended that the proposed project be approved for funding.

was given by the author to the following effect:

17. The above is a copy of the original as it appears in the original.

not at home when it was placed upon the table, and

and still not at home at the bottom of the page.

THE UNIVERSITY OF CHICAGO PRESS

[Faint mirrored bleed-through from the reverse side of the page]

SECRET

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

paragraph was followed by a number of others in which the plaintiff traversed all the material allegations of the two special pleas which the defendant had filed. In traversing these allegations, the paragraphs in question were not directed to the two special pleas as such, but to the various paragraphs that made up the two pleas; and to that extent, these paragraphs purporting to constitute replications to the two special pleas, were inartificially drawn.

These paragraphs or replications concluded as follows:

"Wherefore plaintiff avers that she should not be barred from maintaining her aforesaid action because of any matters or things hereinabove pleaded by the said defendant, or any of his servants or agents. Wherefore plaintiff asks judgment."

The day following the filing of this document, the case was reached for trial on the short cause calendar. The defendant again moved to strike the case from that calendar which motion was denied. Thereupon, the defendant interposed a demurrer to the replications as filed by the plaintiff, excepting the first paragraph which was in the form of a similiter to the plea of the general issue. The demurrer set up a number of special grounds relied upon, to the general effect that the replications did not answer the special pleas, but were directed to various paragraphs making up the pleas and also that they failed to show what, if any, consideration had passed from

testimony was followed by a number of others in which the plaintiff traversed all the material allegations of the two special pleas and the defendant had filed. In the various cross allegations, the paragraphs in question were not directed to the two special pleas as such, but to the various paragraphs that made up the two pleas; and to that extent, these paragraphs purporting to contradict allegations to the two special pleas, were immaterially directed.

These paragraphs of allegations contained as

follows:

"Wherefore plaintiff avers that the same are not the basis for maintaining her recovery action because of any matter or thing heretofore pleaded by the said defendant, or any of his estate or agents. Wherefore plaintiff asks judgment."

The day following the filing of this document, the case was removed for trial on the next court calendar. The defendant again moved to strike the same from the caption which action was denied. Thereupon, the defendant introduced a document to the plaintiff as filed by the plaintiff, containing the first paragraph which was in the form of a stipulation to the effect of the contract. The document set up a number of special grounds relied upon, to the effect that the plaintiff's action did not answer the special pleas, but was directed to various paragraphs making up the pleas and also that they failed to show that, if any, consideration had passed from

the plaintiff for the note in question, and further that the replications did not conclude with a verification or to the country. The court overruled the demurrer. Thereupon counsel for the defendant further objected to the hearing of the case on the short cause calendar for the reason that it was not at issue at the time it was placed upon that calendar, and on the further ground that it was not yet at issue, and again moved the court to strike the case from the short cause calendar, which motion was overruled. A jury was then impaneled and the plaintiff presented her evidence, the defendant taking no part in the trial. At the conclusion of the plaintiff's evidence, the court directed the jury to find the issues for the plaintiff and assess her damages in the sum of \$1218.00. It appeared that the judgment as originally entered had been for a larger amount, being based upon an erroneous computation of the interest, whereupon the court entered an order to the effect that the judgment entered by confession, was to stand, modified in amount, so as to make it a judgment for \$1218.00.

From this judgment, the defendant has appealed^{ed} x// and urges that the said judgment be reversed by reason of errors committed by the trial court in (1) placing the case on the short cause calendar when not at issue; (2) refusing to strike the case from the short cause calendar; (3) overruling the demurrer of the defendant to plaintiff's replications; (4) forcing defendant to trial over objection, before the case was properly at issue, and in refusing to sustain the defendant's objection thereto.

the Plaintiff for the same is questioned, and further that the Plaintiff did not comply with a verification of the same. The court overruled the demurrer. There- upon ordered for the defendant to file a verification of the same on the next court day for the reason that it was not in issue at the time it was filed upon that defendant, and on the further ground that it was not yet at issue, and again moved the court to strike the same from the short cause calendar, which motion was overruled. A jury was then impaneled and the Plaintiff presented her evidence, the defendant failing to put in the trial. At the conclusion of the Plaintiff's evidence, the court directed the jury to find the issue for the Plaintiff and assessed her damages in the sum of \$1112.00. It appeared that the judgment as originally entered had been for a larger amount, being based upon an erroneous computation of the interest, whereupon the court entered an order to the effect that the judgment entered by confession, was to stand, modified in amount, no as to make it a judgment for \$1112.00.

From this judgment, the defendant has appealed. And upon this appeal the court has reversed by reason of errors committed by the trial court in (1) placing the case on the short cause calendar when not at issue; (2) refusing to strike the same from the short cause calendar; (3) overruling the demurrer of the defendant to Plaintiff's verification; (4) forcing defendant to trial over objection to the same and improperly at issue, and in refusing to sustain the defendant's objection thereto.

It seems clear that this case should not have been placed on the short cause calendar, for at the time that was done, it clearly was not at issue. One of the rules of the Circuit Court which was introduced in evidence, provides that "no case shall be noticed for trial on such (short cause) calendar until the same is at issue." The case could not be said to be at issue within the meaning of this rule until an issue of fact had been formed on each of the pleas filed. French v. Schooley, 108 Ill. App. 606. For the same reasons, the first motion made by the defendant to strike the case from the short cause calendar should have been allowed. After a careful consideration of the matter we are unanimously of the opinion that these errors on the part of the trial court were not cured when replications were later filed by the plaintiff. The case was reached for trial on the short cause calendar the day after these replications were filed and the court directed the trial to proceed over defendant's objections. Section 27 of chapter 110 of our statutes provides:

"Upon any party, his agent or attorney, in any suit at law, pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon ten days' previous notice to all of the other parties to the suit, him or their agent or attorney, said suit shall be placed by the clerk upon said short cause calendar."

But the same situation would be presented if more than ten days had elapsed between the filing of the replications and the trial of the case. The case was erroneously placed upon the short cause calendar over defendant's objection. Further error was committed in overruling defendant's motion to strike the case from the short cause calendar. When the case was reached for

trial defendant again moved to strike the case from the short cause calendar and objected to going on with the trial of the case. When the trial court again overruled defendant and directed the trial to proceed, the defendant took no part in it and therefore did not waive any of the points he had made.

The trial court properly overruled the defendant's demurrer to the plaintiff's replications, notwithstanding the fact that they were rather loosely drawn. Properly, the replications should have been directed to the two special pleas as such, rather than to the various paragraphs of which they were made up. It was not necessary that they set forth what consideration passed for the note from the plaintiff, which would have been pleading the evidence. It was sufficient for them to set forth, as they did, that a valuable consideration did pass from the plaintiff for the note, in due course. It is also true that the replications would have been more properly drawn if they had concluded to the country. The language with which they do conclude substantially amounts to that.

For the reasons stated, the judgment of the Circuit Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

trial defendant again moved to strike the case from the
short record of evidence and objects to being on the
trial of the case. When the trial court again over-
ruled defendant and directed the trial to proceed, the
defendant took no part in it and therefore did not waive
any of the rights in the case.

The trial court properly overruled the defendant's
motion to the plaintiff's testimony, notwithstanding
the fact that they were rather loosely given. Briefly,
the testimony should have been directed to the two
special places as such, rather than to the various parts
of which they were made up. It was not necessary
that they set forth that construction given for the
case from the plaintiff, which would have been leading
the witness. It was sufficient for them to set forth
as they did, that a valuable construction had been given
the plaintiff for the case, in due course. It is also
true that the testimony would have been more properly
given if they had confined to the country. The language
with which they do conclude substantially amounts to that.

For the reasons stated, the judgment of the
district court will be affirmed and the cause remanded.

REVEREND THE HONORABLE

352 - 23697

CONSOLIDATED WATER POWER and
PAPER CO., a corporation,

Appellant,

vs.

THE LOUISVILLE HERALD CO., a
corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 569

MR. JUSTICE THOMSON delivered the opinion of the
court.

The plaintiff, Consolidated Water Power and
Paper Co., brought this action against the defendant,
The Louisville Herald Co., to recover a balance alleged
to be due under an agreement for the sale of print paper.
The defendant filed an affidavit of merits, denying that
there was any balance due beyond the sum of \$1,830.86,
which amount, it said it stood ready to pay. The trial
court entered an order that the plaintiff have and re-
cover from the defendant, the amount admitted by the
latter to be due, namely, the sum of \$1,830.86, and by
the same order, the court reserved for future determina-
tion, the question of the further claims of the plaintiff
which were denied by the defendant. The amount so awarded
the plaintiff, was paid by the defendant, and the order
satisfied in that regard. The defendant then filed a coun-
ter claim, wherein it alleged the existence of a written
contract between the parties, ^{and} a breach thereof on the part
of the plaintiff, whereby the defendant had suffered dam-
ages as alleged. To this statement of counter-claim, the
plaintiff filed an affidavit of merits, contending that
it had not.

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it had not committed any breach of the alleged contract, but had furnished the defendant all the paper it was obliged to furnish by its terms.

A trial of these issues was had before the court without a jury, as a result of which, the court found the issues for the defendant, The Louisville Herald Co., both on the issues involving the claim made by the plaintiff, and the counterclaim made by the defendant, and entered judgment against the plaintiff, and in favor of the defendant, for the sum of \$5,656.29, being the damages alleged by it in its counterclaim. From this judgment, the plaintiff has appealed.

For convenience, we shall refer to the plaintiff, as the Manufacturer, and to the defendant, as the Publisher. So far as it is necessary to state them for the purpose of this opinion, the facts involved in this case, are as follows:

In the latter part of January, 1916, the parties entered into a written contract for the purchase and sale of print paper. The parts of the contract having to do with this controversy, are as follows:

"The Manufacturer hereby agrees to sell and furnish to the Purchaser, and the Purchaser hereby agrees to purchase from the Manufacturer and receive for use in the publication of The Louisville Herald, a newspaper published in the City of Louisville, Kentucky, and for its continuous use during 11 months, from February 1, 1916 to December 31, 1916, two thousand tons (2,000 tons), with a leeway of five per cent over or under in quantity per year, of Standard Roll Print, which shall be substantially, of the same average quality, as sample attached thereto. Shipments shall be at the rate of about 180 tons per month * * *. The Purchaser hereby covenants and agrees to pay the Manufacturer for all paper delivered under this contract as above, two dollars (\$2.00) per 100 pounds * * *. The first car, under this contract, shall be shipped on or about the 25th of January, 1916, and on all subsequent shipments, thirty days notice to

ship shall be given by the Purchaser."

Under this contract, the Publisher sent the Manufacturer formal written orders, from time to time, specifying the quantities and sizes to be shipped, and received paper from the Manufacturer in the following approximate quantities: February, 1916 - 74 tons; March, 1916 - 123 tons; April, 1916 - 157 tons; May, 1916 - 166 tons; June, 1916 - 163 tons; July, 1916 - 180 tons; August, 1916 - 171 tons; September, 1916 - 167 tons; October, 1916 - 190 tons; November, 1916 - 186 tons; December, 1916 - 186 tons. This constituted all the paper for which the Publisher sent the Manufacturer written orders or specifications in 1916, except one car for June, when the Publisher sent specifications for eight cars, and received only seven. To make this up, the Publisher increased its order for July from seven cars to eight. In the month of January, 1917, the Manufacturer shipped the Publisher 650 rolls of paper as ordered. All these shipments aggregated 1911.457 tons.

During the period of the contract, there were frequent delays in the shipments, and a number of letters were introduced in evidence in which the Publisher urged the Manufacturer to fill its specifications and ship paper as ordered, as promptly as possible, in order that a shortage might be avoided. It further appears that the Publisher requested and urged the Manufacturer to make shipments up to the full amount claimed by them under the contract. Mr. Gladfelter, the manager of the Publisher at Louisville, testified that during the period in question, he made repeated demands, both through letters and orally to Mr. Curtis, the sales manager of the Manufacturer, for

paper in greater amounts than the Publisher was receiving. He testified: "During the year, 1916, we endeavored to get shipments from the Consolidated Company of all the tonnage of paper contemplated under the contract. We made repeated demands on Mr. Curtis and to their office at Grand Rapids for the delivery of the paper. We were anxious to obtain all the paper from the Consolidated Company during 1916, and we made demands in order to create a surplus here (Louisville). We failed to get 188,543 tons; that is the amount which we demanded in 1916 under the contract, and which the Consolidated Company failed to deliver * * * everything that we specifically ordered by letter was received * * *. But we were constantly urging Mr. Curtis, orally, at our various meetings, to ship us more paper and protect us."

On cross examination, Mr. Gladfelter was asked "as a matter of fact, you never placed an order with him (Curtis) orally for any particular car or amount of paper in excess of your specifications, did you?" To this the witness answered, "I don't recall that I did specifically - no." We have been unable to find any provisions in the contract calling for written specifications from the Publisher as a condition precedent to the obligation of the Manufacturer to supply the quantity called for by the contract. All the Publisher had to do, under the contract, was to give thirty days notice to ship.

Mr. Gladfelter further testified: "We had been accustomed to carrying a reserve, and never had any trouble in carrying and keeping a reserve up to that time. Our contract prior to February 1, 1916 was with the Consolidated Water Power and Paper Co. and they had always

report in December 1940 and the following was received.
No facilities: During the year, 1940, no facilities for the
shipment from the Consolidated Company of all the company
of paper manufactured under the contract. We were requested
to ship to Mr. Curtis and to make a list of goods inside
for the delivery of the goods. We were unable to obtain
all the paper from the Consolidated Company during 1940.
and we made demands in order to obtain a further rate
(Baltimore). We failed to pay \$10,000.00; that in the
contract which we demanded in this regard the contract, and
which the Consolidated Company failed to deliver to us
everywhere that we specifically ordered by letter was not
given to us. But we were eventually ordered by Mr. Curtis,
initially, at our various meetings, to ship us more paper
and protect us.

On several occasions, Mr. Curtis was asked
for a list of goods, but never placed an order with him
(Curtis) exactly for any particular set of goods or paper
in excess of your specifications. His reply: To ship the
goods required, "I don't recall that I did specify any -
no." We have been unable to find any provisions in the con-
tract calling for either specifications from the Consolidated
as a condition precedent to the shipment of the goods. All
it is simply the contract called for by the contract. All
the shipment had to do, under the contract, was to give
Curtis any order to ship.

Mr. Curtis further testified: "The last order
received to deliver a contract, and never had any goods
in shipment and never a receipt up to that time. Our
contract was to deliver 1, 100,000 with the con-
solidated paper and paper Co. and they had always

kept us well supplied. We kept a safe quantity, * * * I should judge about a month's supply, here. During the operations of the contract of January 25, 1916, we were never able to keep such stock on hand, and we were not able to have the reserve stock during that period because we were held to definite specifications by the mill; they only wanted us to specify just what our requirements would be from month to month, * *. Mr. Curtis told me that they were hard pressed to fill their contracts, and that they were requesting all the newspapers with whom they had contracts, to order only the amount of paper that they actually consumed, and in ordering the amounts that we did, we were endeavoring to accommodate them." The substance of these alleged conversations with Mr. Curtis were not denied by him or any other witness for the Manufacturer.

Some time in November, 1916, Mr. Curtis representing the Manufacturer, called upon Mr. Town, representing the Publisher, requesting him to furnish the Manufacturer the figures as to the tonnage necessary to carry the Publisher through December 31, saying they would supply no paper beyond those requirements, under the contract. Mr. Town contended that that did not complete the contract. Mr. Curtis asserted it was all they proposed to do under the contract, and said that they would not ship the Publisher another pound of paper, unless the information requested was furnished. Mr. Curtis further said, the Manufacturer would supply the Publisher with the amount of tonnage necessary to carry them through December 31, under the contract, but over and beyond that, the price of any paper furnished, would be 3 1/2 cents per pound. The information demanded by the Manufacturer, was

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any other officers for the same purpose.

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furnished by the Publisher, some time in November, or early in December. Following this, on December 8, 1916, Mr. Town wrote the Manufacturer as follows: "As per arrangements made with your Mr. Curtis, today, we should be glad to have you ship to Chicago, Louisville and Denver, the equivalent of one month's maximum consumption of paper in each of these three cities less (plus) whatever tonnage is as yet unprovided to take care of our needs for the present month, which in the case of Denver, we understand, is 116 tons; for Louisville, 2 cars, and for Chicago, 90 tons. Mr. Curtis informs us that all paper shipped over and above the amount necessary to meet our needs for the month of December, will be charged for, at the rate of three and one-half (3 1/2) cents per pound at mill."

The Publisher remitted for some of the paper furnished for use after December 31, 1916, at 3 1/2 cents. It became necessary to use a small amount of this paper before December 31, and the Publisher advised the Manufacturer of this, claiming the benefit of the two cent rate as to that paper, whereupon the Manufacturer allowed the Publisher a credit of 1 1/2 cents per pound on such of the paper as had been paid for at 3 1/2 cents per pound, and which they had actually used before December 31. The other deliveries in January followed, which the Manufacturer had told the Publisher would be charged for, at the 3 1/2 cent rate, and as to which, the Publisher had written the letter of December 8. On February 21, 1917, the Publisher sent the Manufacturer a letter enclosing a check for \$1,830.86, in full payment of all deliveries to that date, figured on the two cent rate, and requesting the delivery of the balance claimed by it under the contract, and then determined after all deliveries,

Transmitted by the publisher, some time in November, or
only in December, following 1914, on December 2, 1914,
Mr. Town wrote the publisher as follows: "As the
arrangement made with your Mr. Galt, today, we should
be glad to have you send to Chicago, Louisville and
Denver, the amount of the amount, including connection
of paper in each of these places (1000) and
every package is not provided to the care of our
people for the present month, when in the case of Denver,
we understand, is 110 tons; for Louisville, 2 tons, and
for Chicago, 60 tons. Mr. Galt informs us that all
paper shipped over and above the amount necessary to
meet our needs for the month of December, will be charged
for, at the rate of three and one-half (3 1/2) cents per
pound of weight."

The publisher replied for some of the paper
transmitted for use after December 31, 1914, at 2 1/2 cents.
It became necessary to use a small amount of this paper
before December 31, and the publisher advised the publisher
of this, advising the benefit of the two cents rate as to
this paper, whereas the publisher allowed the publisher
a credit of 1 1/2 cents per pound on each of the paper so
had been paid for at 2 1/2 cents per pound, and which they
had actually used before December 31. The other deliveries
in January followed, when the publisher had told the
publisher would be charged for, at the 2 1/2 cent rate, and
as to which, the publisher had written the latter of December
2. On January 27, 1915, the publisher sent the publisher
a letter enclosing a check for \$1,325.80, in full payment of
all deliveries to date, charged on the two cent rate,
and requesting the delivery of the balance advanced to it
under the contract, and also delivered after all deliveries.

as amounting to 188.543 tons. The Manufacturer contended, it was not obliged to furnish the Publisher any further paper under the contract, and that there was due it under the alleged arrangements made by Mr. Curtis with Mr. Town, confirmed by the letter of December 8, written by the latter, 3 1/2 cents for each pound of paper it had furnished beyond that actually needed and used by the Publisher on and before December 31. The Publisher declining to pay for any of the paper delivered, beyond the two cent rate, the Manufacturer filed this suit, alleging an agreement based upon the conversation between Mr. Curtis and Mr. Town in the fall of 1916, and the correspondence following, principally Mr. Town's letter of December 8. The Publisher filed its affidavit of merits alleging that it owed the Manufacturer nothing beyond the remittance it had tendered February 21, 1917, amounting to \$1,830.86 which paid for all the paper the Manufacturer had delivered, based on the rate specified in the contract existing between the parties, namely, two cents per pound, which amount, it again tendered and later paid under the court order we have referred to. The Publisher then filed its counterclaim alleging an obligation on the part of the Manufacturer, under the contract of January 25, 1916, to furnish it 2100 tons of paper and that, although requested to furnish that full amount, during the contract period, the Manufacturer had failed to do so, but had defaulted to the extent of 188.543 tons, which the purchaser had been obliged to procure on the open market at an advance of 1 1/2 cents per pound over the price specified in the contract, and claiming damages at that rate on the amount of the Manufacturer's alleged default, under the contract.

[illegible]

The entire controversy, in this case, is based upon the construction to be placed on the clauses of the contract which we have quoted.

In our opinion, the meaning of the contract is plain. As contended by the Publisher, the words "with a leeway of five per cent over or under in quantity per year," fix the minimum amount which the Manufacturer could compel the Publisher to take which was 1900 tons, and the maximum amount which the Publisher could compel the Manufacturer to deliver, which was 2100 tons. Staver Carriage Co. v. Park Steel Co., 220 Ill. 412. In construing this contract, we must give effect, if possible, to all the provisions it contains. If the construction contended for, by the Manufacturer is adopted, and the contract is held to be one for so much paper as the Publisher required for the continuous use of The Louisville Herald between February 1 and December 31, and no more, it would result in the complete rejection of the words "two thousand (2000) tons with a leeway of five per cent over or under in quantity per year." This should not be done without a plain necessity, or to prevent a defeat of the purposes sought to be attained by the parties to the contract. If the parties meant by the contract that the amount of paper covered by it, was to be such as the Publisher actually needed for the continuous publication of The Louisville Herald, between the dates named, and no more, then the words, giving the limits of the quantity covered by the contract, were superfluous and useless. By giving the contract the construction contended for by the Publisher, all the words in it are consistently given their proper significance, and plainly express the purposes

apparently in the minds of the contracting parties when the contract was entered into. The quantity of paper sold under the contract was expressly put at 2000 tons with a five per cent leeway. This leeway clause was for the benefit of both parties. With that provision in the contract, the Publisher, was assured that it could not be compelled to take more than 1900 tons, but that it could call for and receive as high as 2100 tons; and on the other hand, the Manufacturer was assured that it could compel the Publisher to take and pay for 1900 tons, but that it could not be required by the Publisher to furnish more than the maximum of 2100 tons. The words "for use in the publication of The Louisville Herald * * * and for its continuous use during 11 months from February 1, 1916, to December 31, 1916" signify the use to which the paper was to be put, but in no way govern the quantity covered by the contract. Bloomington Canning Company v. Union Can Company, 94 Ill. App. 62.

The Manufacturer insists that certain acts of the Publisher which took place during the contract period, were such as to indicate that it was governing itself under the contract, according to the meaning for which the manufacturer now contends, and that the Publisher should be held to such an interpretation of the contract.

While it is true that courts will look to the acts of the parties indicating their interpretation of a contract, where its terms are ambiguous, the legal effect of the contract must be enforced, notwithstanding the acts of the parties under it, where its language and meaning are clear. Canterbury v. Miller, 76 Ill. 355;

Union Carbide Company, 34 111. Ave. 23,
covered by the contract. Unloading Charges were
the paper was to be paid, but in no way govern the quantity
1, 1915, to December 31, 1916, against the use to which
and for the continuous use during 11 months from February
"for use in the production of the Louisville Herald" * * *
to furnish more than the maximum of 150 tons. It would
year, but that it would not be required by the Louisville
could require the publisher to take and pay for 1500
The other case, the manufacturer was required that it
could call for and receive as much as 1500 tons; and an
contracted to take more than 1500 tons, but that it
benefit of both parties. When that provision in the con-
a five per cent interest. This liability of mine was for the
under the contract was expressly put at 1500 tons with
contract was entered into. The quantity of paper with
apparently in the name of the contracting parties when the

[illegible]

Stettauer v. Hamlin, 97 Ill. 312. It would seem as though this contract should be put in the latter class. Beyond this, however, the acts of the Publisher to which the Manufacturer has called our attention do not seem to us to be such as to indicate that it was treating this as a requirement contract. It may be that the requests made to the Manufacturer by the Publisher on these two occasions, involving requests for shipments of paper to be used in executing large orders for printing circulars, indicate that it was considering these as orders for paper, over and beyond that involved in the contract, but we fail to see how this view can bring us to the construction of the contract, now insisted upon by the Manufacturer. At most, the Publisher, could not get more than 2100 tons under the contract, and it is apparent, from the evidence, that such an amount was approximately necessary to keep the paper going for the period covered by the contract. It would seem that rather than dip into its reserve, as far as it would be necessary to fill these large printing orders, the Publisher thought it the part of wisdom, not to fill the orders unless it could secure the paper necessary to do so, outside of the contract covering its regular supply.

The Manufacturer makes much of the fact that it filled all the written orders and specifications actually forwarded by the Publisher during the contract period, and contends, in this connection, that under the provisions of the contract, no shipments were to be made by it, except upon the monthly orders or requisitions of the Publisher. The contract does not so provide. It does say that "thirty days' notice to ship shall be given" by the Publisher, and that "shipments shall be at the rate of

about 180 tons per month." We have previously referred to the uncontradicted testimony of Mr. Gladfelter, to the effect that almost continuously throughout the contract period, he was urging the Manufacturer, by telegram, letter and conversation, both to hasten and increase shipments; that the Manufacturer represented that there was a shortage of paper, and requested the Publisher to limit its monthly specifications to the amounts actually necessary to keep it going, which was done to accommodate the Manufacturer; but that the Manufacturer was repeatedly being urged to make further shipments, to prevent the reserve supply of the Publisher from falling too far below the safety point, which was the condition in which the Publisher frequently found itself during the contract period. It may ~~be~~^{be} well, as urged by the Manufacturer, that under this contract, the Publisher could not order 40, 50 or 60 tons a month, at its pleasure, for the greater part of the contract period, and then order the balance for delivery during the closing months of the contract. Nor, on the other hand, should the Manufacturer be permitted to keep the quantity called for, as low as possible, at its urgent requests, and then escape the delivery of the full amount called for under the contract, by an appeal to the monthly shipment clause of the contract. In referring to this clause, the Manufacturer treats it, as though the five per cent leeway provision of the contract applied to that clause. It clearly does not. The contract calls for shipments at the rate of "about 180 tons a month." The five per cent leeway clause in the contract applies to the total amount covered by the contract, and it is significant that this clause is further modified by the

about 1930 some day. We have previously mentioned
to the undersigned testimony of Mr. Haddock, in
the direct that almost continuously throughout the one-
year period, he was using the manufacturer, by tele-
gram, letter and conversation, with to London and the
other witnesses; that the manufacturer representing that
there was a shortage of paper, and requested the publisher
to limit the number of copies in the amount actually
necessary to keep it going, which was done to accommodate
the manufacturer; but that the manufacturer was repeatedly
being asked to make further shipments, to prevent the re-
ceipts of the publisher from falling too far below
the sales point, which was the condition in which the
publisher frequently found himself during the contract
period. It was ^{he} xxxxxx, as stated by the manufacturer, that
under this contract, the publisher could not order 50, 100
or 200 copies a month, at the discretion, for the greater
part of the contract period, and that order the delivery
for delivery during the closing months of the contract.
Nor, on the other hand, should the manufacturer be per-
mitted to keep the quantity of copies for, as far as possible,
at the highest maximum, and then stop the delivery of the
full amount called for under the contract, by an appeal to
the monthly shipment clause of the contract. In relation
to this clause, the undersigned states it, as though the
five per cent yearly provision of the contract applied
to that clause. It clearly does not. The contract calls
for shipment at the rate of about 100 copies a month.
The five per cent yearly clause in the contract applied
to the total amount ordered by the publisher, and it is
evident that this clause is applied to the total by the

phrase "in quantity per year." The evidence shows that this contract was on one of the regular forms provided by the Manufacturer in making its yearly contracts with publishers who were its customers. The phrase in question is to be given its evident meaning, although this particular contract covered only 11 months. The presence of that phrase in the contract, in our judgment, strengthens the interpretation contended for by the Publisher.

Even treating this as a requirement contract and assuming that the naming of the amount was simply to give the limits within which the Manufacturer could call on the Publisher to take the paper, or the Publisher could call on the Manufacturer to furnish the paper as needed for the specific purpose for which the paper was to be delivered and accepted (the position contended for, by the Manufacturer), the evidence shows that the Publisher did need the maximum amount called for by the contract for its continuous use in publishing The Louisville Herald, during the period named in the contract, and was, therefore, within its rights in calling for the maximum of 2100 tons, and that it did all that it was required to do, under the contract, to secure that maximum amount within the contract period, thereby obligating the Manufacturer to supply that amount, under the contract. Any contention, that the Manufacturer could insist, as it did in November, on knowing just how much paper was actually needed to publish The Louisville Herald up to and including December 31, and to decline to deliver anything under the contract beyond that, is untenable.

phases "in quantity per hour". The said and above that
this contract was one of the regular forms provided
by the manufacturer in making the party contracts with
publishers who were the subscribers. The price in ques-
tion is as given in the contract, although this
particular contract entered into in 1908. The price
was of course in the contract, in one instance.
The contract was the contract for the
contract.

Even though this is a reproduction of the contract
and showing that the terms of the contract was simply
to give the parties which the manufacturer could
call on the publisher to take the paper, or the publisher
could call on the manufacturer to furnish the paper as
needed for the specific purpose for which the paper was
to be delivered and accepted (the contract contained
for, by the manufacturer), the contract was not the
contract but was the contract which was called for by
the contract for the publisher use in publishing the
contract. The contract was the contract in the con-
tract, and was, therefore, within its rights in making
for the contract of 1908, and that is all that
is not required to be, under the contract, to secure con-
tract with the contract, to the only oblig-
ing the manufacturer to supply the contract, under the
contract. And therefore, that the manufacturer could
insist, as it did in 1908, on having the paper
never was actually needed to publish the contract, and
up to and including January 31, and in making to be
after nothing under the contract beyond that, is untenable.

The testimony is that the amount necessary for the continuous use of the Publisher in publishing a daily newspaper for a given period, under the conditions as disclosed by the evidence, contemplates the continuous presence of about a month's supply as a reserve. At the beginning of this period, the Publisher did have on hand such a supply, amounting to about 254 tons. This was at the close of the period of a similar contract between these parties. At times during the contract period, involved here, this reserve got very low. If the Manufacturer's interpretation of this contract is to be accepted, the Publisher would find itself, at the close of the contract period, without any reserve at all, the last roll delivered, under the contract, having been consumed in getting out the paper on the closing day of the period. That such a condition was in the contemplation of either party to this contract, is impossible. The Publisher had the right to use as much of the paper received under the contract as was reasonably necessary, to properly replenish its reserve. Stayer Carriage Co. v. Park Steel Co., 220 Ill. 412, 416. And the presence of a clause in the contract to the effect that the paper was for the continuous use of the Publisher during the period named, can not be made to mean that the Publisher could not call for and receive paper under the contract, and replenish its reserve with it, and the fact that some of that reserve as so replenished by paper received under the contract, might not actually be used until after the period covered by the contract, is wholly immaterial and beside the question.

In our opinion, there is no particular significance in the fact that after the Manufacturer had told the Publisher

The testimony is that the account necessarily for the same
purpose use of the publisher in publishing a daily news-
paper for a given period, under the conditions as dis-

closed by the witness, contemplated the conditions
presence of about a month's work in a treasury, at the
beginning of this period, the publisher did have an idea
such a supply, amounting to about 100 tons. This was the

the date of the period of a similar meeting between
these parties. At times during the contract period, involved
here, this reserve was very low. If the publisher's

intention of this contract is to be executed, the
publisher would then itself, at the close of the contract
period, without any reserve at all, the last will be
what the contract, having been concerned in having at the
beginning of the period, that there is a small
also was in the contemplation of either party to this con-

tract, as indicated. The publisher had the right to use
as much of the paper received under the contract as was
reasonably necessary, to properly conduct his business,
during the period of the contract, and the publisher

and the presence of a large in the contract in the contract
and the paper was for the publisher use of the publisher
during the period, and was to be used to conduct the
publisher could not sell for and receive paper under the

contract, and retained the reserve at all, and the fact that
some of that reserve was not relinquished by paper received under
the contract, might not necessarily be used until after the
period covered by the contract, is wholly immaterial and has

also the question.
In our opinion, there is no particular significance
in the fact that after the contract was sold the publisher

that it would deliver no paper at the 2 cent rate, under the contract, beyond the amount necessary for its continuous use in publishing its paper, up to and including December 31, and that the price for any additional paper furnished would be 3 1/2 cents per pound, and after the Publisher had received and paid for certain paper at that figure, beyond the quantity it had designated as necessary to carry it through December 31, and had later found it necessary to use some six thousand pounds of the paper which it had paid for at the 3 1/2 cent rate, to carry it through December 31, it applied for and received, a rebate of 1 1/2 cents per pound on the amount so used. The Manufacturer had said it would supply all paper actually needed and used up to and including December 31 at the two cent rate, and in applying for the rebate in question, the Publisher was simply getting all it deemed it could, under the construction the Manufacturer was insisting upon, and its action, in this regard, can in no sense be considered as evidence of any subjective interpretation of the contract, on its part.

Evidence was admitted by the trial court, to the effect that there was a custom in the print paper trade to supply newspapers under contracts, such as the one herein involved, and that under such contracts, according to that custom, the publishers would receive the paper necessary to print their editions during the period named by the contract, but that such a contract would not contemplate the furnishing of paper for use beyond the expiration of the contract period; that under this custom, the publisher must take the minimum amount specified in the contract, and is entitled to the maximum if he needs it in the

that it would deliver no paper at the 2 cent rate, under
the contract, between the amount necessary for the con-
struction was in proportion to the paper, up to and including
December 31, and that the price for any additional paper
furnished would be 2 1/2 cents per pound, and after the
furnishing had received and paid for certain paper at that
figure, between the quantity it had furnished as necessary
to carry it through December 31, and the later time it
necessarily to use more six thousand pounds of the paper
which it had paid for at the 2 1/2 cent rate, to carry it
through December 31, it applied for and received, a rebate
of 1 1/2 cents per pound on the pounds so used. The
contractor and said it would supply all paper actually
needed and used up to and including December 31 at the
two cent rate, and in applying for the rebate in ques-
tion, the publisher was already getting all it needed at
that time, under the construction the contractor was in-
stantly upon, and the rebate, in this regard, was in no
sense to constitute an advance of any subjective in-
terest of the publisher, on the part.

Witness was directed by the trial court, to the
effect that there was a mistake in the paper price
to which reference should be made, and as the fact that
involved, and that under such mistake, according to that
contract, the publisher would receive the paper necessary
to print that edition under the price named in the con-
tract, but that such a contract would not constitute
the furnishing of paper for use beyond the expiration
of the contract period; that under this view, the pub-
lisher would take the minimum contract specified in the con-
tract, and in relation to the minimum it is agreed in the

printing of his editions. Under the evidence, the Publisher has shown, in our judgment, that it did need the maximum for its use in publishing The Louisville Herald during the period specified in the contract, taking into consideration the need of the presence of a proper reserve stock which must be included in all calculations of the amount necessary for the continuous use of the Publisher during the period contracted for. But if there may be aid to be a difference between the custom referred to and the terms of this contract, the contract must control, and its terms must be complied with, notwithstanding the custom, for its terms and requirements are clear. Dixon v. Dunham, 14 Ill. 324; Fay v. Strawn, 32 Ill. 295.

As to the claim that the conversation had by Mr. Town, representing the Publisher, with Mr. Curtis, representing the Manufacturer, in November and December, and the letter December 8 written by Mr. Town to the Manufacturer, to which we have referred in reciting the facts of the case, constituted a contract to pay for all paper used after December 31 at the 3 1/2 cent rate, our opinion is, that it can not be maintained. A careful analysis of the letter in question, shows that there was no promise or agreement, either express or implied, on the part of Mr. Town to pay 3 1/2 cents per pound for all paper furnished beyond that called for by the figures demanded by the Manufacturer and furnished by the Publisher giving the amount actually necessary to see the latter through December 31. The Publisher can not be said to have waived any of the rights it was insisting upon, under the contract, by furnishing the Manufacturer the information as to the amount of paper absolutely necessary to publish The Louisville Herald up to and including December 31.

Printing of his edition. Under the evidence, the testimony
has shown, in my judgment, that it was the intention
for the use in publishing the Louisville Herald during
the period specified in the contract, being into com-
munication the need of the presence of a bona fide
work and it must be intended in all contemplation of the
court necessarily for the publication of the Louisville
Herald during the period contracted for. And it must be
aid to be a difference between the contract entered up and
the terms of this contract, the contract being void.
And the terms must be complied with, notwithstanding the
fact that the contract was not complied with. Wheat
et al. v. The Louisville Herald, 22 Ill. 200.

As to the claim that the contract was made by
Mr. Town, representing the Louisville Herald, with Mr. Curtis,
representing the Louisville Herald, in November and December,
and the latter contract is written by Mr. Town to the same
effect, so which we have referred to in setting the facts
of the case, constituted a contract to pay for all paper
used after December 31 at the 1/2 cent rate, our opinion
is, that it was not intended. A careful analysis
of the facts in question, shows that there was no pro-
mise or agreement, either express or implied, on the part
of Mr. Town to pay 1/2 cent per page for all paper
published beyond that called for by the contract contained
in the contract and intended by the Louisville Herald
the amount actually necessary to see the latter through
December 31. The Louisville Herald was said to have valued
one of the rights it was holding upon, which for con-
tract, by publishing the Louisville Herald, the intention as
to the amount of paper actually necessary to publish
the Louisville Herald up to and including December 31.

Those figures were furnished under the threat that, if they were not forthcoming, there would not be another pound of paper delivered by the Manufacturer to the Publisher. What such a consequence would mean to the publisher of a daily newspaper in a large city, needs no elaboration. The Manufacturer lays much stress on the phrase "as per arrangements made with your Mr. Curtis today," as used by Mr. Town in his letter of December 8. But in the "arrangements made with your Mr. Curtis", as shown by the evidence, there was no agreement on Mr. Town's part to pay the 3 1/2 cent rate on any paper furnished, short of the maximum of 2100 tons he claimed, the Publisher was entitled to, under the contract. The Manufacturer claims that a constructive or implied agreement to pay the 3 1/2 cent rate for all paper beyond that actually needed up to and including December 31, arose when Mr. Town sent in his order or request for shipment as contained in his letter of December 8, following the conditions and terms as to such deliveries which had been specified and laid down by Mr. Curtis. This position might be sound, were it not for the existence of the written contract of January 25, 1916, and the fact that Mr. Town was as insistent as to his rights under that contract in his talks with Mr. Curtis, as the latter was in denying them. The letter of December 8 by Mr. Town to the Manufacturer must be read in the light of the fact that the "arrangements made with your Mr. Curtis" referred to therein, consisted of certain demands or conditions laid down by Mr. Curtis, and vehement protests, on the other hand, by Mr. Town, but no promises, whatever, on his part, so far as

These figures were furnished under the threat that if they were not forthcoming, certain action would be taken. Some of paper delivered by the manufacturer to the publisher. That when a correspondence would have to the publisher of a daily newspaper in a large city, needs no elaboration. The manufacturer pays such rates as the press "as per arrangement made with your Mr. Curtis today," as made by Mr. Town in his letter of December 8. But in the "arrangement made with your Mr. Curtis," as cited by the evidence, there was no agreement on Mr. Town's part to pay the \$1 1/2 cent rate on any paper furnished, except at the expense of Mr. Town he claimed, the publisher was entitled to, under the contract. The manufacturer claims that a corrective or implied agreement to pay the \$1 1/2 cent rate for all paper beyond that actually needed up to and including December 31, arose when Mr. Town sent in his order or request for shipment as contained in his letter of December 8. Following the conclusion and terms as to such deliveries which had been specified and laid down by Mr. Curtis. This position might be sound, were it not for the existence of the written contract of January 10, 1915, and the fact that Mr. Town was an independent as to his rights under that contract in his claim with Mr. Curtis, as the latter was in default thereof. The letter of December 8 by Mr. Town to the publisher must be read in the light of the fact that the "arrangement made with your Mr. Curtis" referred to therein, was a claim of certain amount or consideration laid down by Mr. Curtis, and subsequent progress, on the other hand, by Mr. Town, but no promise, agreement, or in part, as far as

the evidence discloses. In agreeing to deliver paper beyond that needed to see the Publisher through December 31, at the 3 1/2 cent rate, the Manufacturer was undertaking to do what it was already obliged to do under the contract up to 2100 tons, at the 2 cent rate, and therefore, even if Mr. Town had promised expressly or may be considered as having promised by implication to pay the increased rate for it, the promise would be void and unenforceable, for it was without consideration. Purington Paving Brick Co. v. Jenkins, 165 Ill. App. 434.

The publisher is entitled to recover the difference of 1 1/2 cents per pound on the amount of paper covered by the contract but never delivered by the Manufacturer amounting to 188.543 tons, and this notwithstanding the fact, the Publisher submitted no proof to the effect that it had purchased this paper at the price of 3 1/2 cents, as it had alleged in its statement of counter-claim. That allegation may be treated as surplusage. Where the vendor refuses to keep his contract of sale, the vendee may recover his damages without the actual purchase of goods elsewhere. Follansbee v. Adams, 86 Ill. 13; Summons v. Hibbard Spencer & Bartlett Co., 153 Ill. 102.

While there is some evidence tending to show that the market price for this paper in January, 1917 was higher than 3 1/2 cents per pound, the Manufacturer seems to have been willing to supply the Publisher with additional paper at that figure, and consequently, the damages of the latter can not be based on a higher market price than 3 1/2 cents per pound.

The evidence disclosed, in connection with delivery of paper
persons that needed to see the publisher through his business
in, at the 3 1/2 cent rate, the publisher was under obli-
gation to do what it was already obliged to do under the
contract up to 3 1/2 cents, at the 2 cent rate, and therefore,
even if Dr. Town had promised otherwise or not, the pub-
lisher was having promised by implication to pay him the
contract rate for it, the promise would be void and non-
enforceable, for it was without consideration. Implication
United States v. Jackson, 100 Ill. App. 434.

The publisher is entitled to recover the dif-
ference of 1 1/2 cents per pound on the amount of paper
covered by the contract and never delivered by the
manufacturer according to the contract, and this is settled
by the fact, the publisher submitted no proof to
the effect that it had purchased this paper at the price
of 3 1/2 cents, as it had offered in its statement of
account. That allegation may be treated as an
allegation, that the vendor refused to keep the contract
of sale, the vendor may recover his damages without the
need of proof of loss of account. Telegraph & Telephone
Co. v. Western Union Telegraph & Telephone Co.
123 Ill. 124.

This Court is now of opinion that it is
that the vendor price for this paper in January, 1917
was higher than 3 1/2 cents per pound, the manufacturer
seems to have been willing to pay it, the publisher with-
out additional paper at that figure, and consequently, the
difference of the paper can not be based on a higher price
than 3 1/2 cents per pound.

For the reasons given, the judgment of the Municipal Court will be affirmed, both on the issues involved in the claim made by the Manufacturer and the counter-claim made by the Publisher.

AFFIRMED.

For the reasons given, the judgment of the
Court is that the claimant is entitled to the
amount of the claim in the sum of \$100,000.00 and
the interest thereon at the rate of 6% per annum.

VERDICT.

The Court is of the opinion that the claimant
is entitled to the amount of the claim in the sum of
\$100,000.00 and the interest thereon at the rate of
6% per annum. The Court is of the opinion that the
claimant is entitled to the amount of the claim in the
sum of \$100,000.00 and the interest thereon at the
rate of 6% per annum. The Court is of the opinion
that the claimant is entitled to the amount of the
claim in the sum of \$100,000.00 and the interest
thereon at the rate of 6% per annum. The Court is
of the opinion that the claimant is entitled to the
amount of the claim in the sum of \$100,000.00 and
the interest thereon at the rate of 6% per annum.

The Court is of the opinion that the claimant
is entitled to the amount of the claim in the sum of
\$100,000.00 and the interest thereon at the rate of
6% per annum. The Court is of the opinion that the
claimant is entitled to the amount of the claim in the
sum of \$100,000.00 and the interest thereon at the
rate of 6% per annum. The Court is of the opinion
that the claimant is entitled to the amount of the
claim in the sum of \$100,000.00 and the interest
thereon at the rate of 6% per annum. The Court is
of the opinion that the claimant is entitled to the
amount of the claim in the sum of \$100,000.00 and
the interest thereon at the rate of 6% per annum.

353 - 23698

CONSOLIDATED WATER POWER AND
PAPER CO., a corporation,
Appellant,

vs.

DENVER PUBLISHING COMPANY,
a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 572

MR. JUSTICE THOMSON delivered the opinion of
the court.

Although the facts involved in this case are
not in all points the same as those involved in the case
of Consolidated Water Power and Paper Co. v. The Louis-
ville Herald Co., being case #23697 in this court, the
issues which they present are practically the same as
the issues which we have considered in connection with
that case, and what we have said in the opinion this
day rendered in that case, applies equally here.

For the reasons set forth in that opinion, the
judgment of the Municipal Court, in favor of the defendant
for the sum of \$1,710.90, will be affirmed.

AFFIRMED.

253 - 25328

OFFICIALS OF THE
U.S. DEPARTMENT OF JUSTICE
APPELLANT

APPELLANT
MUNICIPAL COURT
OF CHICAGO

vs.

DEWEY FURNITURE COMPANY,
a corporation.
APPELEE

211 I.A. 572

MR. JUSTICE THOMAS delivered the opinion of

the court.

Although the facts involved in this case are not in all points the same as those involved in the case of Consolidated Natural Gas Co. v. The People of the City of New York, coming case before in this court, the issues which they present are practically the same as the issues which we have considered in connection with that case, and what we have said in the opinion this day rendered in that case, applies equally here.

For the reasons set forth in that opinion, the judgment of the Municipal Court, in favor of the defendant for the sum of \$1,716.20, will be affirmed.

ATTEST.

EDWARD LYMAN BILL, Inc.,
PUBLISHERS OF THE MUSIC
TRADE REVIEW.

Appellee.

vs.

CHARLES H. LEECH,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

211 I.A. 578

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an action of the fourth class in the
Municipal Court of Chicago wherein the plaintiff sought to
recover an amount alleged to be due from the defendant for
certain advertising which was the subject of contract be-
tween the parties. A trial was had before the court with-
out a jury and the court found the issues for the plain-
tiff and assessed the plaintiff's damages at \$262.08, and
entered judgment for that amount, from which the defendant
has appealed.

The defendant filed an affidavit of merits, in
which he set up (1) that the plaintiff was not a corpora-
tion authorized to do business in the State of Illinois,
(2) that he did not contract with the plaintiff for any
advertising, and that the plaintiff did not furnish any
advertising to the defendant, and (3) that the defendant
had not promised the plaintiff to pay for any advertising.
The only witness in the case testified for the plaintiff
that he was a trade paper solicitor, and had been employed
by the plaintiff for four years and a half, that he had

ROBERT L. BROWN, JR.,
ATTORNEY AT LAW,
CHICAGO, ILL.

CHICAGO, ILL.
JANUARY 10, 1911

CHARLES E. BROWN,

CHICAGO, ILL.

211 I.A. 578

THE COURT.

THIS is an action of the Court in the
Circuit Court of Chicago wherein the plaintiff seeks to
recover an amount alleged to be due from the defendant for
certain advertising which was the subject of contract be-
tween the parties. A trial was had before the Court with
a jury and the Court found the issues for the plain-
tiff and awarded the plaintiff's damages of \$200.00, and
entered judgment for that amount, from which the defendant
has appealed.

The defendant filed an affidavit of merits, in
which he set up (1) that the plaintiff was not a corpo-
ration authorized to do business in the State of Illinois,
(2) that he did not contract with the plaintiff for any
advertising, and that the plaintiff did not furnish any
advertising to the defendant, and (3) that the defendant
had not promised the plaintiff to pay for any advertising.
The only witness in the case called for the plaintiff
was a single paper collector, and had been employed
by the plaintiff for four years and a half, that he had

solicited advertising from the defendant and had secured two advertising contracts from him, which contracts were introduced in evidence. Both of these alleged contracts were in the form of communications addressed to "Edward Lyman Bill." In one of them, that name is followed by the word "publisher" and in the other, by the words, "editor and proprietor". They are both signed by the defendant. The execution of these contracts is not denied, nor the fact that the advertising as covered by the contracts, was furnished. The witness further identified two letters which were admitted in evidence, both signed by the defendant, one dated April 22, 1915 addressed to "The Music Trade Review" and the other, March 18, 1916 to "A. J. Trimpe, Business Manager of Music Trade Review." In these communications, the defendant expresses appreciation of the courtesy which has been extended him in regard to his account, and proceeds to explain why he has not been able to pay it, and expresses the hope that he will be in a position to pay the account in full, within a short time. The witness testified further that the Music Trade Review is a paper published by the plaintiff, and that no part of the account had been paid. On cross-examination, the witness testified that he was employed in 1914 by Edward Lyman Bill, and that the latter died January 1, 1916. Counsel for the defendant asked "and during Mr. Bill's life-time, he was the gentleman who conducted the business as proprietor and editor, etc.?", and the witness replied "He was sole proprietor."

The defendant contends that the evidence shows that his contracts were with Edward Lyman Bill, personally,

and not with the corporation, and that, inasmuch as the plaintiff is Edward Lyman Bill, a corporation, and there is no proof of an assignment of the account from Edward Lyman Bill to the corporation, the plaintiff is not shown to have such an interest in the subject-matter as to sustain the suit, and further, that there is a fatal variance between the allegations of the statement of claim and proof. There is no merit to either of these contentions. So far as the record shows, the corporate name of the corporation involved is "Edward Lyman Bill," the letters "inc." being descriptive of the corporation, and not a part of the corporate name. There is nothing in the record to show that the contracts in question were not with "Edward Lyman Bill" the corporation. Certainly nothing to the contrary is indicated or proven by the fact that, during his life-time, Edward Lyman Bill was the sole proprietor of the business. Clearly, defendant's promises to pay this account, as contained in his letters, one of which was written after the death of Edward Lyman Bill, were made by him to the corporation. There was further evidence of an oral promise to pay the account made by the defendant to the witness, who testified that the promise was made at a time when the witness was in the employ of the plaintiff corporation.

The defendant makes the further point, that the plaintiff was not a corporation authorized to do business in Illinois. There is no evidence in the record bearing upon this issue. The burden of proving that defense was upon the defendant. Abbau v. Grassie, 262 Ill. 636, 639, and cases there cited.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

and not with any other, and that, inasmuch as the plain-
tiff is Edward James Hill, a corporation, and there is no
proof of an assignment of the account from Edward James Hill
to any corporation, the plaintiff is not bound to show
an interest in the subject-matter as to sustain the writ,
and further, that there is a fatal variance between the alie-
gations of the complaint of claim and proof. There is no
proof to either of these contentions. As far as the record
shows, the corporate name of the corporation involved is
"Edward James Hill, the letters 'Inc.' being descriptive
of the corporation, and not a part of the corporate name.
There is nothing in the record to show that the witness
in question was not with "Edward James Hill" the corpo-
ration. Certainly, nothing to the contrary is indicated or
shown by the record. During his lifetime, Edward James
Hill was the sole proprietor of the business. Clearly, the
plaintiff's promise to pay the account, as contained in
his letter, one of which was written after the death of
Edward James Hill, were made by him to the corporation.
There was no other evidence of an oral promise to pay the
account made by the defendant to the witness, who testified
that the promise was made at a time when the witness was in
the employ of the plaintiff corporation.

The defendant makes the further point, that the
plaintiff was not a corporation authorized to do business
in Illinois. There is no evidence in the record to
show this. The record of proving that between was
upon the plaintiff. James V. Hill, Inc., No. 111, 650, 651,
and more like this.

Nothing on that is the record, the judgment of
the Circuit Court will be affirmed.

504 - 23849

LAURENCE M. FINE,

Appellant,

vs.

LOUIS FOX and LEO FOX,

Appellees.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

211 I.A. 579

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, in which the plaintiff sought to recover for an alleged conversion by the defendants of personal property, ownership of which, was claimed by the plaintiff. A hearing was had by the trial court without a jury, resulting in a finding of the issues for the defendants. Judgment followed accordingly, from which the plaintiff has appealed.

There were three adjoining lots held by one owner. The south lot was sold to the defendants. The middle lot and north lot were sold to one Fryer. The latter conveyed his two lots to another, and in that transaction, was represented by the plaintiff. At the time of this last conveyance, the plaintiff purchased from Fryer for the sum of \$15.00, in cash, and his services in connection with the conveyance, which he valued at \$50.00, a certain iron fence which the evidence shows had been erected across the middle lot by the man who had originally owned all three of the lots.

LAWSON, M. WINE.

Appellant.

vs.

PAULS, BEN AND LAW, ELL.

Appellees.

CHICAGO COURT,
CHICAGO.

2111 A. 529

THE COURT OF APPEALS DELIVERED THE OPINION OF

THE COURT.

This was an action of the Court of Appeals in the Municipal Court of Chicago, in which the plaintiff sought to recover for an alleged conversion by the defendant of personal property, ownership of which was claimed by the plaintiff. A hearing was had by the trial court without a jury, resulting in a finding of the law for the defendant. Judgment followed accordingly, from which the plaintiff has appealed.

There were three adjoining lots held by one owner. The center lot was sold to the defendant. The whole lot and north lot were sold to one buyer. The latter conveyed the two lots to another, and in that transaction, was represented by the plaintiff. At the time of this last conveyance, the plaintiff purchased from the other for the sum of \$15.00, in cash, and his services in connection with the conveyance, which was valued at \$50.00, a certain iron fence which the defendant also had been erected across the whole lot by the man who had originally owned all three of the lots.

The north wall of the house located on the lot owned by the defendants was erected on or very close to their north lot line and a section of this iron fence extended back from the front line of the middle lot, to the steps leading up to the porch of the defendants' house. At the time Fryer sold his two lots, one of the defendants saw him removing this fence that extended across the middle lot which was vacant. He made inquiries of Fryer as to the reason for removing the fence, and the latter told him that he had sold his property, and the purchasers were to take possession on the following Monday, and therefore, he was removing the fence. Nothing appears to have been said by Fryer about any sale of the fence by him to the plaintiff. The one of the defendants who had this conversation with Fryer testified that he assumed that the part of the fence that extended back along his stairway on or near his lot line, belonged to him, and therefore, he took that part of the fence up and put it in his basement. The evidence indicates that this was done in the presence of Fryer, who made no objection. The remainder of the fence having been delivered to the plaintiff, he discovered, upon erecting it, that a section was missing and upon inquiry, discovered that it was in the defendants' possession, and it is this section of the iron fence which the plaintiff claims was the subject of conversion by the defendants. We have carefully examined both the abstract and the record and are of the opinion that the court did not err in finding the issues, as to the conversion, for the defendants.

The north wall of the house located on the lot owned by the defendant was erected on a very close to their north lot line and a section of this fence was removed from the front line of the defendant's house. As the building up to the north of the defendant's house, the fence was removed and the fence was removed across the middle lot which was vacant. The fence was removed of the fence to the reason for removing the fence, and the latter told him that he had sold his property, and the purchasers were to take possession on the following Monday, and therefore, he was removing the fence. Nothing appears to have been said by the defendant about any sale of the fence by him to the plaintiff. The fact of the defendant who had this conversation with the plaintiff that he knew that the part of the fence that extended back along his property or on near the lot line, belonged to him, and therefore, he took that part of the fence up and put it in his basement. The evidence indicates that this was done in the presence of the plaintiff, and made no objection. The remainder of the fence having been delivered to the plaintiff, he discovered, upon erecting it, that a section was missing and upon inquiry, discovered that it was in the defendant's possession, and it is this section of the fence which the plaintiff claims was the subject of conversation of the defendant. We have carefully examined both the exhibits and the report and are of the opinion that the court did not err in finding the issue, as to the conversation, for the defendant.

It is urged that there must be a reversal of the finding of the trial court on the ground that the plaintiff was denied the right of taking a non-suit. After the plaintiff and one other witness testifying in his behalf had concluded their testimony, the plaintiff rested except as to one witness, who had not arrived in court and who was to testify as to the value of the fence. Thereupon, one of the defendants took the stand and proceeded to testify. At the conclusion of his testimony, the court said "I don't think I'll waste any more time on this case. Finding * * - - - - -" Here the plaintiff interrupted, saying, "Just a moment. I want to take a non-suit in this case." The court then proceeded to formally announce his finding for the defendant. Section 30 of the Municipal Court Act provides that, "every person desirous of suffering a non-suit, shall be barred therefrom unless he do so before the jury retired from the bar or before the court, in case the trial is by the court without a jury, states its finding." The question, therefore, is, did the plaintiff move for a non-suit before the court had stated its finding. While it is true that the request for a non-suit was interposed before the court made formal announcement that the finding of the court was for the defendants, yet, it was not made before the court had stated, in substance, what the finding would be. The remark made by the trial judge, to the effect that he would not waste any more time on this case, when taken in the light of the testimony and other statements that had been made by the court previously, as shown by the record, amounted to a statement on the part of the court, in substance, as to what his finding would

It is urged that there must be a reversal of the finding of the trial court on the ground that the plaintiff was denied the right of taking a non-suit. After the plaintiff and one other witness testifying in his behalf had concluded their testimony, the plaintiff rested except as to one witness, who had not arrived in court and was in custody as to the value of the license. Thereupon, one of the defendants took the stand and proceeded to testify. At the conclusion of his testimony, the court said "I don't think I'll waste any more time on this case. Finding - - - - -". Here the plaintiff interrupted, saying, "Just a moment. I want to take a non-suit in this case." The court then proceeded to formally announce its finding for the defendant. Section 30 of the Municipal Court Act provides that "every person desirous of entering a non-suit, shall be heard thereon before he or she before the jury retired from the bar or before the court, in case the trial is by the court without a jury, states his finding." The question, therefore, is, did the plaintiff move for a non-suit before the court had stated its finding. While it is true that the request for a non-suit was introduced before the court when formal announcement was made that the finding of the court was for the defendant, yet, it was not made before the court had stated, in substance, what the finding would be. The remark made by the trial judge, to the effect that he would not waste any more time on this case, when taken in the light of the testimony and other statements that had been made by the court previously, as shown by the record, amounted to a statement on the part of the court, in substance, as to what the finding would

be. This is further indicated by the fact that the plaintiff, in his haste to secure a non-suit, interrupted the trial judge in the middle of his formal announcement of his finding. In our opinion, the motion for non-suit came too late. Yudelson v. Winterberg, 185 Ill. App. 454; Springer v. The Campbell Co., 174 Ill. App. 278, 282.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

be. This is further indicated by the fact that the plain-
tiff, in his haste to secure a non-suit, interrupted the
trial judge in the middle of his formal announcement of
his finding. In our opinion, the action for non-suit
must fail. Yukelson v. Yukelson, 130 Ill. App. 434;
Leisner v. The Chicago Co., 174 Ill. App. 375, 381.

Finding no error in the record, the judgment of
the appellate court will be affirmed.

AFFIRMED.

524 - 23869

RAFAEL PALAS,

Appellee,

vs.

HARVEY ROOM COMPANY, a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 580

MR. JUSTICE THOMSON delivered the opinion of
the court.

This was an action of the fourth class in the
Municipal Court of Chicago, by which the plaintiff, Palas,
sought to recover the sum of \$140.00 delivered by him to
the clerk of the defendant for safe keeping. A trial was
had before the court without a jury. The defendant has
appealed from a judgment for the plaintiff for the full
amount claimed.

The defendant was an inn-keeper, and the plain-
tiff was its guest. It was not denied that the plaintiff
deposited \$140.00 with the defendant's clerk for safe keep-
ing, and was given a receipt for the money by the clerk.
When the plaintiff later requested his money, the clerk
had disappeared. The president of the defendant company
testified that the clerk was not authorized to receive
or care for any sum of money in excess of \$5.00. The
evidence further showed that there was a sign upon the
wall of the office of the hotel in question, reading,
"Not responsible for valuables or money lost or stolen

211 I.A. 280

MR. JUSTICE ARTHUR delivered the opinion of

the court.

There was an action of the fourth class in the
county court of Chicago, by which the plaintiff, John,
sought to recover the sum of \$140.00 delivered by him to
the agent of the defendant for wife keeping. A trial was
had before the court without a jury. The defendant was
adjudged to be liable for the plaintiff for the full
amount claimed.

The defendant was an inn-keeper, and the plain-
tiff was his guest. It was not denied that the plaintiff
deposited \$140.00 with the defendant's clerk for safe keep-
ing, and was given a receipt for the money at the desk.
When the plaintiff later requested his money, the clerk
had disappeared. The president of the defendant company
testified that the clerk was not authorized to receive
or take for any sum of money in excess of \$5.00. The
evidence further shows that there was a sign upon the
wall of the office of the hotel in question, reading,
"Not responsible for retention of money lost or stolen"

in its premises beyond the value of \$5.00." The only question presented by this appeal relates to the possibility of an innkeeper limiting his liability by the posting of such a notice as the one above quoted.

Where the guest of an innkeeper deposits money for safe keeping with the clerk of the innkeeper, and the latter absconds with it, the innkeeper will be liable. Zimmerman v. Murphy, 131 Ill. App. 56; Hardcastle v. Ryder, 175 Ill. App. 430. The innkeeper may, by notice, require the guest to conform to reasonable rules. 22 Cyc. 1083 Van Wyck v. Howard, 12 Howard's Practice 147, 150. But except as provided by our Statute, the innkeeper may not limit his legal liability by the mere posting of a notice. The guest of an innkeeper has a right to assume that a clerk in the innkeeper's employ, having charge of the office, is one with whom he may properly leave money for safe keeping, at least up to a reasonable amount. Where a guest does leave money with an innkeeper's clerk for safe keeping, and the clerk steals it, the law makes the innkeeper liable for the loss. To successfully limit that liability in amount, as the innkeeper sought to do in the case at bar by the posting of a notice, it would not only be necessary that that notice be clear and explicit, but it would further be necessary for the innkeeper to show that he brought the notice home to the knowledge of the guest so that when the relation of innkeeper and guest was entered into, it was with knowledge on the part of the guest of the limitation of liability on the part of the innkeeper, that limitation thus becoming a part of the contract entered into by the parties, when the relationship was entered

in its premises beyond the value of \$5.00." The only question presented by this appeal relates to the liability of an innkeeper limiting his liability by the posting of such a notice as the one above quoted.

Where the guest of an innkeeper deposits

money for safe keeping with the clerk of the innkeeper, and the latter absconds with it, the innkeeper will be liable. Simmern v. Murphy, 121 Ill. App. 56; Herdcastle v. Fisher, 178 Ill. App. 430. The innkeeper may, by notice, reduce the guest to conform to reasonable rules. 28 Cyc. 1083 Van Wyck v. Howard. Is Howard's

Practice 147, 156. But except as provided by our Stat-

ute, the innkeeper may not limit his legal liability by the mere posting of a notice. The guest of an innkeeper has a right to assume that a clerk in the innkeeper's employ, having charge of the office, is one

with whom he may properly leave money for safe keeping, at least up to a reasonable amount. Where a guest does leave money with an innkeeper's clerk for safe keeping,

and the clerk steals it, the law makes the innkeeper

liable for the loss. To successfully limit that liability in amount, as the innkeeper sought to do in the case

at bar by the posting of a notice, it would not only be

necessary that that notice be clear and explicit, but it

would further be necessary for the innkeeper to show that

he brought the notice home to the knowledge of the guest

so that when the relation of innkeeper and guest was en-

tered into, it was with knowledge on the part of the guest

of the limitation of liability on the part of the innkeeper,

that limitation thus becoming a part of the contract enter-

ed into by the parties when the relationship was entered

into.

The notice involved in the case at bar was far from clear. Assuming that the guest could read it and that he did read it, he might well assume that by it, the innkeeper sought to limit his liability in case of the theft of money or valuables lost in the hotel or stolen by other guests, and that it, in no way, referred to the theft of money or valuables by the innkeeper's own servants.

Further, it not only does not appear that the plaintiff knew of this rule and assented to it, but the contrary is apparent from the fact that the testimony shows the plaintiff was a foreigner and could not read English. Both because the rule was not clear and explicit, and because its provisions were not brought home to the knowledge of the plaintiff, it failed to affect the innkeeper's liability under the law, and there was, therefore, no error in finding the issues for the plaintiff, and therefore, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

The notice involved in the case of the war was

for the plaintiff. Assuming that the court would find it

and that he did not, it, he might well assume that by

it, the plaintiff would be liable for the liability in case

of the fault of money or otherwise lost in the total or

shown by other means, and that it, in no way, related

to the right of money or otherwise by the plaintiff's own

assumption.

Further, it not only does not appear that the

plaintiff knew of this rule and assumed to it, but the

contract is apparent from the fact that the plaintiff

knows the plaintiff was a plaintiff and would not have

known. Both between the two was not clear and was

plaintiff, and between the plaintiff and the plaintiff was

to the knowledge of the plaintiff, it failed to allow

the plaintiff's liability under the law, and the law was,

therefore, an error in finding the liability for the plaintiff,

and therefore, the judgment of the plaintiff's court will be

affirmed.

REVEREND.

536 - 23881

WALTER J. ELLIS,

Appellee.

vs.

HILLISON AND ETTEN COMPANY,
a corporation,

Appellant

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 581

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, by which the plaintiff sought to recover the sum of \$105.00 under an alleged contract between himself and the defendant company. There was a trial before the court without a jury, after which, the court found the issues for the plaintiff and entered judgment for the sum of \$106.00, from which judgment, the defendant has appealed.

The contract which in the basis of this suit, reads as follows:

"To Walter J. Ellis January 26, 1917.
Please give our staff a Demonstration of your
'New Method' Embossing which, if it is as you
claim, we will purchase at \$105.00 (on Sat. week)
12 o'clock.

Hillison & Etten Co.,
Harry Hillison."

The defendant claims that this is not a contract, but a counter offer on his part, to plaintiff's original offer, which was to sell the defendant the right to use the process in question for the sum named. While the defendant did not accept the plaintiff's original offer, and made the counter-

828 - 2188

WILLIAM J. HILL

Attorney

vs.

HILLMAN AND OTHERS
A CORPORATION

Defendants

211 A. 581

RE. JUDICIAL PROCEEDING delivered the opinion of the

Court.

THIS was an action of the Court in the

Judicial Court of Chicago, by which the plaintiff sought

to recover the sum of \$100.00 under an alleged contract

between himself and the defendant company. There was a

trial before the court without a jury, after which the

court found the issue for the plaintiff and entered

judgment for the sum of \$100.00, from which judgment

the defendant has appealed.

The contract which is the basis of this suit.

reads as follows:

"To William J. Hill

I have given you a license to sell

'New World' Magazine, at \$1.00 per copy

which we will purchase at \$100.00 (one hundred)

in cash.

Witness my hand and

Seal this 1st day of

The defendant claims that this is not a contract, but a contract

or offer on his part, to plaintiff's original offer, which

was to sell the defendant the right to use the property in

question for the sum named. While the defendant did not

proposition contained in the writing quoted above, that writing constituted an outstanding offer which ripened into a binding obligation as soon as the plaintiff made the demonstration called for and it proved as he had claimed. The evidence shows that the plaintiff did make the demonstration called for in the contract and, while the evidence is conflicting, we cannot say from the record that it did not warrant the finding of the trial court, to the effect that the process as thus demonstrated was satisfactory to the defendant and fulfilled the claims which the plaintiff had made. That finding, in our opinion, being warranted by the evidence, the plaintiff was entitled to recovery.

The defendant further contends that Harry Hillison who signed the contract, was not an officer of the corporation, but merely an employee, and that he had no authority, either express or implied, to sign the contract. We think the trial court was warranted in coming to the opposite conclusion from the evidence. The plaintiff testified that he called on the defendant for the purpose of selling it the right to use this patented process, and that he talked with Mr. M. E. Hillison, the president of the defendant company, telling him that he had a new process of embossing to sell, whereupon Hillison told him to see Mr. Harry Hillison and talk to him about it. This reply by the president of the company, in the light of his knowledge that the plaintiff was seeking to sell something to the company, was sufficient to clothe Harry Hillison with apparent authority to deal in the subject-matter on behalf of the corporation as its duly authorized agent. There is also some conflict in the testimony as to the original conversation between the plaintiff and M. E.

proposition contained in the writing quoted above, that writing executed on or after the date of the writing into a binding obligation as soon as the plaintiff made the communication called for and it proved as he had claimed. The evidence shows that the plaintiff did make the communication called for in the contract and, while the evidence is conflicting, we cannot say from the record that it did not warrant the finding of the trial court, to the effect that the process as then conducted was satisfactory to the defendant and plaintiff and that the plaintiff had made, that finding, in our opinion, being warranted by the evidence, the plaintiff was entitled to recovery.

The defendant further contends that Henry Hillman was agent for defendant, was not an officer of the corporation, but merely an employee, and that he had no authority, either express or implied, to sign the contract, or that the trial court was warranted in coming to the opposite conclusion from the evidence. The plaintiff testified that he relied on the defendant for the purpose of selling it the right to use this patented process, and that he talked with Mr. H. E. Hillman, the president of the defendant company, telling him that he had a new process of exposing to sell, whereupon Hillman told him to see Mr. Henry Hillman and talk to him about it. This reply by the president of the company, in the light of his knowledge that the plaintiff was desiring to sell something to the company, was sufficient to create Henry Hillman with apparent authority to deal in the subject matter on behalf of the corporation as its duly authorized agent. There is also some conflict in the testimony as to the actual conversation between the plaintiff and H. E.

Hillison, but as to that, it is also our opinion that the finding of the trial court was warranted by the testimony. He saw the several witnesses and heard them testify and was better able to judge of the proper weight of their testimony than we can be.

The defendant further contends that the plaintiff's statement of claim does not set forth a cause of action. Section 40 of the Municipal Court Act requires "A statement of the plaintiff's claim which statement, if the suit be on a contract, express or implied, shall consist of a statement of the account or of the nature of the demand * * *." As the statement of claim here involved included a copy of the contract sued on, and a statement to the effect, that after the contract was signed, the plaintiff demonstrated his method, and was informed by the defendant that it was satisfactory, it was sufficient. The Statute referred to, does not require that the statement of claim in a case of the fourth class in the Municipal Court shall set forth a cause of action with the particularity required by a common law pleading, but merely a statement of the account or nature of the demand sued on. Enberg v. City of Chicago, 271 Ill. 404, 409; C. I. & L. Ry. Co., v. Monarch Lumber Co., 262 Ill. App. 20; Kappes v. Bacon, Ill. App. First District case #23212, opinion filed December 28, 1917.

The statement of claim further set forth that the plaintiff's claim was upon an account stated and the testimony showed that after the plaintiff had made his demonstration, and had sent a bill for the amount specified in the contract, he called upon the defendant for a check on two different occasions, and at neither time,

The following further occurred on the line:

The statement of claim number 27221 filed by the Plaintiff's claim was upon an account stated and the testimony showed that after the Plaintiff had made his statement, he had sent a bill for the amount thereof to the defendant, he called upon the defendant for the amount thereof, and the defendant refused to pay the same.

was payment refused, nor was any statement made to the effect that the process was not what he had claimed for it or unsatisfactory, but on the first occasion, he was told that the one who made out the checks was out, and he should return later, and on the second occasion, he was told by Harry Milliken that the defendant did not care to pay for the process until they had made something out of it.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

was promptly returned, but was not returned to the effect that the person was not what he had claimed for it or unavailability, but on the first occasion, he was told that the two who were not coming was not, and in the second return later, and on the second occasion, he was told by Henry Williams that the defendant did not have to pay for the goods until they had made something out of it.

finding an error in the record, the judgment of the defendant is affirmed.

REMARKS

The defendant is charged with the crime of larceny, to-wit: the taking of the property of another with intent to defraud. The evidence shows that the defendant took the property of the victim, and that he intended to defraud the victim. The evidence is sufficient to sustain the charge. The defendant is guilty of the crime charged. The judgment of the court is affirmed.

The defendant is charged with the crime of larceny, to-wit: the taking of the property of another with intent to defraud. The evidence shows that the defendant took the property of the victim, and that he intended to defraud the victim. The evidence is sufficient to sustain the charge. The defendant is guilty of the crime charged. The judgment of the court is affirmed.

285 - 23630

EDSON R. GILBERT and WILLIAM
H. DUNN,

Appellants,

vs.

ROBERT M. SWEITZER et al.,
Appellees.

4298
APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

211 I.A. 583

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Since the judgment of the trial court was affirmed, appellants have filed a petition asking that the order of affirmance be vacated; that this court adjudge the appeal was taken to the wrong court and that an order be entered transferring the cause to the Supreme Court.

Our powers and duties in this regard are set forth in chapter 110, section 102, of the Practice Act.

In this case certain constitutional questions were presented which the appeal to this court waived. The record presented other questions proper to be decided by this court which were argued by the respective parties and upon the questions thus raised, we considered and decided the case and entered the order of affirmance. Petitioners asked and obtained the judgment of this court upon the merits of such questions, even though appellees' brief called their attention to the fact that this court could not entertain the constitutional questions raised and argued.

We do not understand the statute to direct a transfer of the cause in this condition of the record. If it does, litigants might speculate upon the probable decisions of this court without being bound thereby.

The petition will be denied.

DENIED.

428
 211 A. 588
 COURT OF COOK COUNTY.
 ALFRED THOM JURIST

23250 - 23250
 H. DUNN,
 Appellant,
 vs.
 ROBERT M. SWANSON et al.,
 Appellees.

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

Since the judgment of the trial court was affirmed, appellants have filed a petition asking that the order of affirmance be vacated; that this court adjudge the appeal was taken to the wrong court and that an order be entered transferring the cause to the Supreme Court.

Our powers and duties in this regard are set forth in chapter 110, section 102, of the Practice Act.

In this case certain constitutional questions were presented which the appeal to this court waived. The record presented other questions proper to be decided by this court which were argued by the respective parties and upon the questions thus raised, we considered and decided the case and entered the order of affirmance. Petitioners asked and obtained the judgment of this court upon the merits of such questions, even though appellees' brief called their attention to the fact that this court could not entertain the constitutional questions raised and argued.

We do not understand the statute to direct transfer of the cause in this condition of the record. If it does, litigants might speculate upon the probable decision of this court without being bound thereby.

The petition will be denied.

DENIED.

CHARLES E. HARDING,
Defendant in Error.

vs.

A. T. A. FILLER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

211 I.A. 584

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The complainant, Charles E. Harding, filed a bill of complaint in the Circuit Court of Cook County in which he alleged that for 25 years prior to March 29, 1915, he had been engaged in the live stock commission business at Union Stock Yards, Chicago, under the firm name of Charles E. Harding & Co.; that as the result of his labor and efforts he had built up a large and profitable business, which yielded him a yearly profit of about \$25,000; that on March 29, 1915, the defendant Filler, a brother-in-law of complainant, was, and for upwards of 13 years had been, in the employ of complainant, and that he, Filler, had unreserved access to the books and records kept in said business and was a trusted employe of complainant; that on the 29th day of March, 1915, the Live Stock Exchange National Bank of Chicago, without authority appropriated to its own use \$14,000 trust funds belonging to customers of complainant deposited in said bank to the credit of complainant, and refused to pay certain checks drawn by complainant against said funds; that at this time Filler advised complainant to go to Texas, where the complainant owned certain real estate, and procure there sufficient funds to meet complainant's pressing requirements; and that he, Filler, would take charge of complainant's business and operate it until his return from Texas; that at this time Filler tendered a loan

CHARLES E. HARRISON,
Defendant in error.

vs.

A. F. A. LEE,
Plaintiff in error.

ORDER TO DISMISS COMPLAINT
ON COURT MOTION.

1111 A. 384

W. F. HARRISON, JUDGE OF THE COURT.
WILLIAM H. HARRISON, CLERK OF THE COURT.

The complaint of Charles E. Harrison, filed in
 will be dismissed in the Circuit Court of Cook County in
 which he alleged that for 25 years prior to March 29, 1915,
 he had been engaged in the live stock commission business
 at Union Stock Yards, Chicago, under the firm name of
 Charles E. Harrison & Co.; that on the result of his last
 audit he had built up a large and profitable business,
 which yielded him a yearly profit of about \$15,000; that on
 March 29, 1915, the defendant, A. F. A. Lee, a brother-in-law of
 complainant, was, and for upwards of 15 years had been, in
 the capacity of complainant, and that he, A. F. A. Lee, had
 secured access to the books and records kept in said business
 and was a trusted employee of complainant; that on the 29th
 day of March, 1915, the live stock business of complainant
 Chicago, without authority appropriated to its own use
 \$14,000 trust funds belonging to complainant; that complainant
 deposited in said bank to the credit of complainant, and
 refused to pay certain checks drawn by complainant against
 said funds; that on this date A. F. A. Lee advised complainant to
 go to Texas, where the complainant owned certain real estate,
 and procure there-without funds to meet complainant's
 pressing requirements; and that he, A. F. A. Lee, would take
 charge of complainant's business and operate it until his
 return from Texas; that on this date A. F. A. Lee induced a loan

of \$3,000 to complainant; that as a result of the suggestion of Filler, complainant, relying upon promises made by him, delivered to Filler a power of attorney to conduct complainant's business.

It is also alleged in the bill that the complainant thereupon opened a new account in the Drovers National Bank of Chicago with the money tendered him by Filler and \$9,000 in addition thereto; all of which was turned over to Filler to enable him to conduct the business of complainant, together with about \$6,000 in collectable notes then due complainant; that complainant proceeded to Texas, leaving Filler in sole charge of his business; that for some weeks thereafter Filler conducted the business on behalf of complainant, holding out to customers that he was acting for complainant; that on May 7, 1915, while complainant was in Texas, he, complainant, was suspended from membership in the Chicago Live Stock Exchange; that such suspension was brought about by the acts of Filler; that thereupon Filler organized the Filler Commission Co., holding out to customers of complainant that he, Filler, had succeeded to the business of complainant.

The bill further alleges that in the conduct of complainant's business Filler had procured profits of upwards of \$50,000, which he refused to account for to complainant; that he, Filler, had collected various amounts on notes and assets of complainant for which he also failed to account; that Filler, in violation of his trust, had taken possession of the offices and live stock pens formerly possessed by complainant and that he had procured a lease to be executed to him of said premises by Union Stock Yards & Transit Co.; the owners; that on the 9th day of February, 1916, Filler in-

of \$3,000 to complainant; that as a result of the suggestion of Miller, complainant, relying upon promises made by him, delivered to Miller a power of attorney to conduct complainant's business.

It is also alleged in the bill that the complainant

thereupon opened a new account in the First National Bank of Chicago with the money tendered him by Miller and \$2,000 in addition thereto; all of which was turned over to Miller to enable him to conduct the business of complainant, together with about \$5,000 in collectible notes from the complainant; that complainant proceeded to Texas, leaving Miller in sole charge of his business; that for some weeks thereafter Miller conducted the business on behalf of complainant, making out to complainant that he was acting for complainant; that on May 7, 1915, while complainant was in Texas, he, complainant, was persuaded that membership in the Chicago Live Stock Exchange; that soon thereafter Miller organized the Miller Lumber Co., holding out to customers of complainant that he, Miller, had succeeded to the business of complainant.

The bill further alleges that in the conduct of complainant's business Miller had procured parties of various of \$50,000, which he refused to release for to complainant; that he, Miller, had collected various amounts of money and made of complainant for which he also failed to account; that Miller, in violation of his trust, and upon possession of the office and live stock now lawfully possessed by complainant and that he had procured a lease to be executed to him of said premises by Union Stock Farm & Livery Co.; the contract was on the 25th day of February, 1916, Miller in-

stituted his suit against complainant to recover \$9,087.79, which he claimed to be due him; that Filler, in fraud of complainant's rights, on July 5, 1916, filed in the office of the clerk of the Circuit court an affidavit for attachment in aid of said suit, in which affidavit Filler stated that complainant's place of residence was Dawn, Texas; that complainant had departed from this State with intention to remove his effects therefrom and with the intention to hinder, delay and defraud his creditors; that Filler well knew complainant had gone to Texas with no intention of residing there; or of removing his property from the State, or of defrauding his creditors; that under the attachment writ issued in said cause Filler caused a note to be attached and the proceeds thereof diverted; that Filler made repeated threats to his sister, complainant's wife, to attach the homestead of complainant in which his said wife was then residing; that Filler well knew while said lawsuit was pending that complainant during December, 1916, and January, 1917, was living at his usual place of residence in Chicago; that Filler caused personal service to be made of the writs issued in said cause during this time, on complainant; that thereafter, when complainant had returned to Texas, Filler caused said cause to be placed on the short cause calendar for trial.

It is further alleged in the bill that on an accounting it would be made to appear that Filler is indebted to complainant in a large sum for the profits of the business belonging to complainant and conducted by Filler, and which business Filler operated as trustee and agent for complainant; that the lessors in the lease referred to are willing and ready to cancel the same or to assign it to complainant; that Filler had sold certain office equipment

alleged his wife against complaint to recover \$9,000.75, which he claimed to be due him; that Miller, in filing of complaint's return, on July 3, 1916, filed in the office of the clerk of the circuit court an affidavit for attachment in aid of said writ, in which affidavit Miller stated that complainant's place of residence was Texas, Texas; that complainant had departed from this state with intention to remove his effects therefrom and with the intention to hinder, delay and defraud his creditors; that Miller well knew complainant had gone to Texas with no intention of returning there, or of returning his property from the state, or of returning his creditors; that under the attachment writ issued in said cause Miller caused a note to be attached and the proceeds thereof diverted; that Miller made repeated threats to his sister, complainant's wife, to attach the household of complainant in which his said wife was then residing; that Miller well knew while said lawsuit was pending, that said complainant during December, 1916, and January, 1917, was living at his former place of residence in Chicago; that Miller caused personal service to be made of the writ issued in said cause during this time, on complainant; that thereafter, when complainant had returned to Texas, Miller caused said cause to be placed on the court calendar and for trial.

It is further alleged in the bill that on an accounting it would be made to appear that Miller is indebted to complainant in a large sum for the services of the business referred to complainant and conducted by Miller, and which business Miller operated as trustee and agent for complainant; that the books in the house referred to are missing and ready to conceal the same or to transfer it to complainant; that Miller had sold certain office equipment

and furnishings, the property of complainant, and that he refused to account for the proceeds thereof.

In his prayer to the bill the complainant seeks an accounting of the profits of the business conducted by Filler, and that he, Filler, may be decreed to hold said commission business and the proceeds and profits thereof, the offices and pens and the lease referred to in trust for complainant.

In a supplemental bill filed April, 1917, it is alleged that on April 10, 1917, complainant was reinstated to full membership on the Chicago Live Stock Exchange over the written protest of the defendant, Filler, this being the only written protest against the reinstatement of complainant. On answers filed the cause was referred to a master, who having heard the evidence introduced by the parties, found that the equities of the cause were with the complainant, and he recommended the entry of a decree in accordance with his findings, which are elaborately set forth in his report.

We have examined the evidence in the record and are inclined to the view that it fairly supports the findings and conclusions of the master. There can be small doubt on the evidence that Filler was a confidential and trusted employe of the complainant prior to March 29, 1915, when the financial troubles of complainant began by the appropriation of his cash balance in the Live Stock Exchange National Bank. The sum so appropriated was, in fact, a trust fund which the bank thereafter paid to certain shippers, the owners thereof. At the time of the appropriation of this fund the complainant was indebted to the bank for a large sum of money, but this indebtedness was well secured and the bank held in addition thereto security of the value of \$30,000 for

and furnishings, the property of complainant, and that he

refused to account for the property thereof.

In his reply to the bill the complainant seeks

an accounting of the profits of the business conducted by

Tiller, and that he, Tiller, may be decreed to hold said

commission business and the proceeds and profits thereof,

the offices and pens and the lease referred to in trust

for complainant.

In a supplemental bill filed April, 1917, it is

alleged that on April 10, 1917, complainant was reinstated

to full membership on the Chicago Live Stock Exchange over

the written protest of the defendant, Tiller, this being

the only written protest against the reinstatement of com-

plainant. In answer filed the case was referred to a

master, who having heard the evidence introduced by the

parties, found that the equities of the case were with the

complainant, and he recommended the entry of a decree in

accordance with his findings, which was separately set

forth in his report.

We have examined the evidence in the record

and are inclined to the view that it fairly supports the

findings and conclusions of the master. There can be small

doubt on the evidence that Tiller was a confidential and

trusted employee of the complainant prior to March 24, 1916,

when the financial troubles of complainant began by the re-

appropriation of his cash balance in the live stock exchange

National Bank. The sum so appropriated was, in fact, a trust

fund which the bank thereafter paid to certain shippers, the

owners thereof. At the time of the appropriation of this

fund the complainant was indebted to the bank for a large sum

of money, but this indebtedness was well secured and the bank

held in addition thereto security of the value of \$50,000 for

further advances, which the complainant says were to be made to him by the bank. Counsel for complainant intimate that litigation is now threatened with reference to the appropriation of the bank balance of complainant, and what we say here is not to be taken as any intimation on our part as to the rights of any persons with reference thereto. It is apparent, however, that Filler took advantage of the embarrassment which was caused complainant by the appropriation of this fund, and that with his, Filler's, knowledge and approval the complainant went to Texas to procure money to tide him over his difficulties.

The evidence discloses that the appropriation of complainant's bank balance caused his suspension as a member of the Live Stock Exchange. The president of this organization testified in effect that this suspension did not necessarily indicate any unethical conduct on the part of complainant; that it was the result of a rule of the organization which required the suspension of a member who had failed to meet his obligations to live stock shippers. It is conceded that on March 29, 1915, the complainant was unable to pay certain debts due shippers of stock. He has, however, since said date, provided for the payment of these obligations and he has been reinstated as a member of the Live Stock Exchange, notwithstanding the fact that defendant Filler, his brother-in-law and former trusted employe, was the only person who made written objection to his reinstatement.

The evidence further shows that prior to March 29, 1915, the business of Charles E. Harding & Co. was operated by complainant; that he owned all of the office fixtures and equipment referred to; and that under his lease with the Union Stock Yards & Transit Co. he had certain

further advances, which the complainant says were to be made to him by the bank. Counsel for complainant insists that litigation is now threatened with reference to the appropriation of the bank balance of complainant, and what we say here is not to be taken as any intimation on our part as to the rights of any persons with reference thereto. It is apparent, however, that Miller took advantage of the embarrassment which was caused complainant by the appropriation of this fund, and that with this, Miller's, knowledge and approval the complainant went to Texas to procure money to tide him over his difficulties.

The evidence discloses that the appropriation of complainant's bank balance caused his suspension as a member of the Live Stock Exchange. The president of this organization testified in effect that this suspension did not necessarily indicate any unethical conduct on the part of complainant; that it was the result of a rule of the organization which required the suspension of a member who had failed to meet his obligations to live stock shippers. It is conceded that on March 29, 1915, the complainant was unable to pay certain debts due shippers of stock. He has, however, since said date, provided for the payment of these obligations and he has been reinstated as a member of the Live Stock Exchange, notwithstanding the fact that defendant, Miller, his brother-in-law and former trusted employee, was the only person who made written objection to his reinstatement.

The evidence further shows that prior to March 29, 1915, the business of Charles A. Harding & Co. was operated by complainant; that he owned all of the office fixtures and equipment referred to; and that under his lease with the Live Stock Farm & Transit Co. he had certain

valuable privileges as to the use of cattle, sheep and hog pens in the Union Stock Yards.

The master found, and we think properly so, that Charles E. Harding had a good reputation as a commission man prior to March 29, 1915; that he had been doing a large and profitable business, which was the result of his integrity and his ability. About 95% of the persons with whom Filler did business in May, 1915, were former customers of complainant.

On March 29, 1915, the complainant was the owner of large tracts of land in Texas and certain real estate in Chicago and Wisconsin, and he also possessed personal assets of considerable value. His total indebtedness at this time amounted to \$251,000. On March 30, 1915, he opened an account in the Drovers National Bank in the name of Chas. E. Harding & Co., and at the same time he opened another account in the same bank in the name of the defendant Filler. Complainant at this time by power of attorney authorized Filler and one McCann to sign checks against his account.

Certain letters are contained in the record signed by one Thayer, who was, the evidence shows, the agent of Filler after complainant went to Texas. While it is not conceded that Thayer had the authority to bind the defendant by his statements in these letters, we think it appears from the admissions of the defendant himself and from other evidence that Thayer was acting for Filler in the correspondence with complainant.

These letters are voluminous and can not be quoted here at great length. As an instance of their general tenor, however, it appears that on May 8, 1915, Thayer at the direction of Filler sent a letter to complainant informing him of his suspension by the Live Stock Exchange; a part of this letter is as follows:

valuable privileges as to the use of cattle, sheep and hog pens in the Union Stock Yards. The master found, and we think properly so, that Charles F. Harding had a good reputation as a commission man prior to March 20, 1915; that he had been doing a large and profitable business, which was the result of his integrity and his ability. About 95% of the persons with whom Miller did business in May, 1915, were former customers of complainant. On March 20, 1915, the complainant was the owner of large tracts of land in Texas and certain real estate in Chicago and Wisconsin, and he also possessed personal assets of considerable value. His total indebtedness at this time amounted to \$551,000. On March 20, 1915, he opened an account in the Farmers National Bank in the name of Charles F. Harding & Co., and at the same time he opened another account in the same bank in the name of the defendant Miller. Complainant at this time by power of attorney authorized Miller and one person to sign checks against his account. Certain letters are contained in the record attached by one Thayer, who was, the evidence shows, the agent of Miller after complainant went to Texas. While it is not conceded that Thayer had the authority to bind the defendant by his statements in these letters, we think it appears from the admissions of the defendant himself and from other evidence that Thayer was acting for Miller in the correspondence with complainant. These letters are voluminous and can not be quoted here at great length. As an instance of their general tenor, however, it appears that on May 5, 1915, Thayer at the direction of Miller sent a letter to complainant informing him of his suspension by the Live Stock Exchange; a part of this letter is as follows:

"Of course for the present that puts you out of the running. It became necessary to do something and do it quick or abandon the business altogether. We immediately organized a new firm called the Filler Commission Co., and have taken the business over and will do the best we can do with it until such a time as you want to do something for yourself and then you can settle with Mr. Filler. * * *

"I think at the earliest possible moment after you have the arrangements made and papers signed you should come home at once, and assist in taking care of the tangled matters you left."

It is a significant fact that even though Filler for some weeks following March 29, 1915, was concededly acting for the complainant in Chicago, he saw fit to correspond with complainant through Thayer.

The theory of the defense is that Filler organized a new business on May 8, 1915, and he denies that he took possession of any property or assets of the complainant excepting certain office furniture.

On the whole evidence it is apparent that Filler in many ways which were disloyal got possession of complainant's property and business. The attachment suit referred to was based upon an affidavit which we think the evidence shows was false in important particulars; the defendant made use of the power of attorney given to him by complainant just before he went to Texas, to aid him in getting possession of complainant's business and property. He made certain representations to the lessors of the premises occupied by complainant to the effect that he was authorized by this power of attorney to accept an assignment of the lease of the premises to himself, and it is evident that the defendant in many ways which cannot be referred to here deliberately sought to strip the complainant of the property and business which came into his possession as the agent of complainant.

When consideration is given to the inherent nature of the business conducted by complainant and the cir-

"Of course for the present that puts you out of the running. It became necessary to do something and do it quick or abandon the business altogether. We immediately organized a new firm called the Miller Commission Co., and have taken the business over and will do the best we can do with it until such a time as you want to do something for yourself and then you can settle with Mr. Miller."

"I think at the earliest possible moment after you have the arrangements made and papers signed you should come home at once, and assist in taking care of the family matters you left."

It is a significant fact that even though Miller for some weeks following March 29, 1915, was concededly acting for the complainant in Chicago, he was fit to correspond with complainant through Thayer.

The theory of the defense is that Miller organized a new business on May 6, 1915, and he denies that he took possession of any property or assets of the complainant excepting certain office furniture.

On the whole evidence it is apparent that Miller

in many ways which were disloyal got possession of complainant's property and business. The attachment suit referred to was based upon an affidavit which we think the evidence shows was false in important particulars; the defendant made use of the power of attorney given to him by complainant just before he went to Texas, to aid him in getting possession of complainant's business and property. He made certain representations to the owners of the premises occupied by complainant to the effect that he was authorized by this power of attorney to accept an assignment of the lease of the premises to himself, and it is evident that the defendant in many ways which cannot be referred to here deliberately sought to strip the complainant of the property and business which came into his possession as the agent of complainant.

When consideration is given to the inherent nature of the business conducted by complainant and the cir-

cumstances which surrounded the parties on March 29, 1915, it becomes almost certain that the complainant, who was a business man of ability, would not consent to permit Filler to appropriate to his own use his, complainant's, business and take possession of his property under the conceded circumstances of the case.

Under the rules of the Live Stock Exchange a suspended member was permitted to handle his live stock commission business pending reinstatement through any member of the exchange in good standing, and under this rule complainant would be entitled to 50% of the net commissions derived from the sale of stock consigned to him.

It is admitted that the defendant, Filler, acted as complainant's agent between March 29, 1915, and May 8, 1915. The evidence shows that on the latter date Filler had in his possession and control the records, books of account, fixtures, bank balance and other property of complainant, including the good will of the business. It is insisted on behalf of the defendant that his agency for complainant ceased on May 8, 1915. The letter of May 8th, hereinbefore quoted from, which was written to complainant by direction of defendant, did not inform complainant of the alleged purpose of defendant in organizing the Filler Commission Company. In this letter Thayer informed Harding of his suspension and therein he said, "It became necessary to do something and do it quick, or abandon the business altogether." This letter clearly was intended to lead complainant to believe that the organization of the Filler Commission Co. was for the purpose of saving the business then owned by complainant and of preserving it until such time as the complainant could give his personal attention to it.

circumstances which surrounded the parties on March 22, 1915, it became almost certain that the complainant, who was a business man of ability, would not consent to permit Miller to appropriate to his own use his, complainant's, business and take possession of his property under the conceded circumstances of the case.

Under the rules of the Live Stock Exchange an unexpired member was permitted to handle his live stock commission business pending reinstatement through any member of the exchange in good standing, and under this rule complaint would be entitled to 5% of the net commissions derived from the sale of stock consigned to him.

It is admitted that the defendant, Miller, noted a complainant's agent between March 22, 1915, and May 8, 1915. The evidence shows that on the latter date Miller had in his possession and control the records, books of account, fixtures, bank balance and other property of complainant, including the good will of the business. It is insisted

on behalf of the defendant that his agency for complainant ceased on May 8, 1915. The letter of May 8th, hereinafter quoted in full, which was written to complainant by direction of defendant, did not inform complainant of the alleged purpose of defendant in organizing the Miller Commission Company. In this letter Thayer informed Harding of his appointment and therein he said, "It became necessary to do something and do it quick, or abandon the business altogether." This letter clearly was intended to lead complainant to believe that the organization of the Miller Commission Co. was for the purpose of saving the business then owned by complainant and of preserving it until such time as the complainant could give his personal attention to it.

Again the evidence tends to show that on May 8, 1915, the defendant directed the Drovers National Bank to pay all outstanding checks of C. E. Harding & Co. out of his personal account with the bank, over 90% of which account represented deposits, the proceeds of live stock sold by Chas. E. Harding & Co. The Filler Commission Company's bank balance was made up of a certificate of deposit of \$13,619.55, which sum represented proceeds of stock sold by Chas. E. Harding & Co. for shippers, a check drawn by Filler against bank balance of \$40.89 to the credit of Chas. E. Harding & Co. and the sum of \$1,088.78, individual property of complainant.

Notwithstanding the claim of defendant that his agency for complainant ceased on May 8, 1915, he paid thereafter certain bills incurred on behalf of complainant prior to May 8, 1915. The evidence is conclusive that the defendant took possession of complainant's business on May 7, 1915, the day that complainant was suspended from the Live Stock Exchange. On the same day a circular on the letterhead of Chas. E. Harding & Co. was mailed by the Filler Commission Co. to the customers of complainant, a mailing list, the property of complainant, being used for this purpose. This circular announced that the Filler Commission Company had purchased the good will, offices and location of the firm of Chas. E. Harding & Co., and that the business was to be conducted in the name of Filler Commission Company. Complainant did not authorize the circular nor had he sold his property and business to defendant.

The record made on the trial of this case is very long and in our examination of the evidence we have been compelled to examine an abstract of record containing 249 pages and an additional abstract filed for complainant of 248 pages. We cannot, as stated, refer here to all of

Again the evidence tends to show that on May 8, 1915, the defendant advised the Hoover National Bank to pay all outstanding checks of C. E. Harding & Co. out of his personal account with the bank, over 50% of which account represented deposits, the proceeds of live stock sold by C. E. Harding & Co. The Miller Commission Company's bank balance was made up of a certificate of deposit of \$13,419.55, which was represented proceeds of stock sold by C. E. Harding & Co. for shipwreck, a check drawn by Miller against bank balance of \$40,875 to the credit of C. E. Harding & Co., and the sum of \$1,088.78, individual property of complainant.

Investigating the claim of defendant that his agency for complainant ceased on May 8, 1915, we find that certain bills incurred on behalf of complainant prior to May 8, 1915. The evidence is conclusive that the defendant took possession of complainant's business on May 7, 1915, the day that complainant was suspended from the live stock exchange. On the same day a circular on the defendant of C. E. Harding & Co. was mailed by the Miller Commission Co. to the customers of complainant, a mailing list, the property of complainant, being used for this purpose. This circular announced that the Miller Commission Company had purchased the good will, offices and location of the firm of C. E. Harding & Co., and that the business was to be conducted in the name of Miller Commission Company. Complainant did not authorize the circular nor had he sold his property and business to defendant. The record made on the trial of this case is very long and in our examination of the evidence we have been compelled to summarize an abstract of record containing 245 pages and an additional abstract filed for complainant of 248 pages. We cannot, as stated, refer here to all of

the evidence shown by this long record. The evidence does indicate that complainant was not dishonest; that he did not intend or attempt to defraud his creditors; that defendant on March 29, 1915, as a consequence of his own suggestions became a trustee of the property and business of complainant, and that his, defendant's, subsequent conduct amounted to a breach of his duty as such trustee.

The report of the master was approved by the court in all respects, except that interest was allowed complainant on the amount found due him from March 1, 1917, only. The theory of the chancellor was that Filler by his conduct and appropriation of the property and interests of complainant was guilty of constructive fraud only. It is our opinion that the evidence shows that the conduct of Filler constitutes actual fraud.

It should be kept in mind that this is a suit between the complainant and one whom he charges as the actual wrongdoer. It is not, on the record, an action between an injured party and an innocent third person who claims title through a wrongdoer.

Some of the authorities relied upon by defendant emphasize the principle that one who neglects promptly to disavow an unauthorized act of his agent makes the act his own. This principle is readily applied in cases involving the rights of an innocent third person. It should not be applied, however, too rigorously where a party complainant seeks relief directly against an agent for injuries resulting from such agent's fraudulent, disloyal and secretive conduct. Vorhees v. Campbell, 275 Ill. 292.

Much complaint is made of the ruling which denied defendant the privilege of amending his answer after

The evidence shown by this long record. The evidence does indicate that complaint was not disallowed; that he did not intend or attempt to defend his creditors; that defendant on March 20, 1915, as a consequence of his own suggestions became a trustee of the property and business of complainant; and that his defendant's subsequent conduct amounted to a breach of his duty as such trustee.

The report of the master was approved by the court in all respects, except that interest was allowed complainant on the amount found due him from March 1, 1917, only. The theory of the complaint was that Willet by his conduct and appropriation of the property and interests of complainant was guilty of constructive fraud only. It is our opinion that the evidence shows that the conduct of Willet constitutes actual fraud.

It should be kept in mind that this is a suit between the complainant and one whom he charges as the author of a wrongdoer. It is not, on the record, an action between an injured party and an innocent third person who claims title through a wrongdoer.

Some of the authorities relied upon by defendant emphasize the principle that one who neglects properly to disavow an unauthorized act of his agent makes the act his own. This principle is usually applied in cases involving the rights of an innocent third person. It should not be applied, however, too rigorously where a party complainant seeks relief directly against an agent for injuries resulting from such agent's fraudulent, illegal and secretive conduct. Yorkes

v. Connelley, 275 Ill. 285.

When complaint is made of the wrong which defendant has done and the privilege of making his answer after

much evidence had been taken in the case. We do not think the court erred in this particular. Drew v. Drew, 271 Ill. 239.

In the answer filed by Filler to the bill of complaint he denied that he had appropriated to his own use complainant's business and property and he, defendant, alleged that the Filler Commission Company's business had no connection with the business conducted by complainant. After the master had prepared his report in the case an effort was made by defendant to amend his answer so as to let in proof that complainant had ratified and acquiesced in the acts and conduct of defendant which complainant complained of. We think the attempt to amend the answer came too late. The answer filed by defendant simply denied the acts complained of, and we think there was no abuse of discretion by the trial court in refusing to permit the defendant to avoid the consequences of acts which the evidence shows he committed, Fidman v. Bowman, 58 Ill. 444 at 449; Vorhees v. Campbell, supra; Crone v. Crone, 180 Ill. 599 at 604-605. Claim is not made that the complainant expressly ratified or acquiesced in the conduct of defendant, and from all the evidence heard by the master it satisfactorily appears that he did not in any other manner acquiesce in or ratify such conduct.

The decree of the Circuit court will be reversed with directions to enter a decree in accordance with the report of the master; the costs of the additional abstract will be taxed as costs in the cause and the plaintiff in error will pay the costs here and in the trial court.

DECREE REVERSED WITH DIRECTIONS.

such evidence had been taken in the case. We do not think
the court erred in this particular. New v. New, 271 Ill.

532.

In the answer filed by Miller to the bill of

complaint he denied that he had appropriated to his own use
complainant's business and property and he, defendant, al-
leges that the Miller Commission Company's business had no
connection with the business conducted by complainant. After

the master had reported his report in the case an effort was
made by defendant to amend his answer so as to set in proof
that complainant had testified and acknowledged in the note and

account of defendant which complainant complained of. We

think the attempt to amend the answer came too late. The
answer filed by defendant shortly denied the facts complained

of, and we think there was no abuse of discretion by the
trial court in refusing to permit the defendant to avoid the
consequences of facts which the evidence shows he committed.

Edison v. Brown, 58 Ill. App. 444 at 449; Vornhes v. Campbell,

Smith v. Smith, 180 Ill. App. 577 at 604-605. It is

not made that the complainant expressly testified or acknowledged
in the conduct of defendant, and from all the evidence heard
by the master it satisfactorily appears that he did not in any
other manner acknowledge in or testify such conduct.

The failure of the plaintiff court will be reversed

with directions to enter a decree in accordance with the report
of the master; the costs of the additional complaint will be
taxed as costs in the cause and the plaintiff in error will
pay the costs here and in the trial court.

REVEREND JUDGE WITH DISSENT.

6473

4300

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

211 I.A. 586

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

8580

Gen. No. 6473.

The People of the State of Illinois

Defendant in error.

vs

Error to Co. Ct. Boone.

Neely Clark, Plaintiff in error.

Dibrell, P. J.

An information was filed in the County Court of Boone County against Neely Clark, containing forty counts. The last count was withdrawn before the end of the trial and defendant was convicted under the first thirty nine counts, each of which charged the unlawful sale of intoxicating liquor in anti-saloon territory. A judgment of fine and imprisonment was entered and that judgment is brought in review by this writ of error.

The case was submitted at the October Term, 1917. We found that the information was not verified. We continued the cause, and received further briefs from counsel upon the question of the effect of that lack of verification, and again took the cause at the April term, 1918. The constitutional rights of Clark were violated by his prosecution upon an information not supported by a sworn complaint or affidavit. *People v Clark* 280 Ill. 160; *People v Hohaker*, 281 Ill. 295. That error can be waived and it is waived if the question is not raised in the trial court. It can be raised by motion to quash, by motion in arrest, and apparently even by a motion for a new trial. No motion to quash the information was made in this case. There was a motion for a new trial, but it was solely on the points stated in a written motion and these points did not in any way suggest that the information was not verified. There was a motion in arrest of judgment. but it was expressly limited to the same written points

The People of the State of Illinois

Defendant in error.

Tyler vs. Geo. W. Rogers.

vs.

Wesley Clark, Plaintiff in error.

Dec-11, P. 3.

An information was filed in the County Court of Boone County against Wesley Clark, containing forty counts. The last count was withdrawn before the end of the trial and defendant was convicted under the first thirty nine counts, each of which charged the unlawful sale of intoxicating liquor to well-known activity. A judgment on fine and imprisonment was entered and that judgment is brought in review of this writ of error. The case was submitted at the October Term, 1914. We found that the information was not verified. We continued the cause, and removed further details from counsel as to the question of the effect of that lack of verification, and again from the cause at the April term, 1915. The constitutional rights of Clark were violated by his prosecution upon an information not supported by a sworn complaint or affidavit. People v. Clark 250 Ill. 120; People v. Holbrook, 251 Ill. 122. That error can be waived and it is waived if the question is not raised in the trial court. It can be raised by motion or demurrer, by motion in arrest, and summarily even by a motion for a new trial. No motion to quash the information was made in this case. There was a motion for a new trial, but it was solely on the points stated in a written motion and those points did not in any way suggest that the information was not verified. There was a motion in arrest of judgment, but it was summarily denied in the same written points.

filed in support of the motion for a new trial. That a motion in arrest may be so limited appears to be held in *Cummings v People* 211 Ill. 393, on p. 402. Again, it does not seem to be raised in this court by an assignment of error. At the April term 1918, we gave plaintiff in error leave to assign an additional error raising this question, but we are unable to find that he did assign error upon the record, pursuant to that leave. It has many times been held that the court can consider no errors except such as are assigned upon the record, and that obtaining leave to assign an additional error or filing with the papers an assignment of error does not amount to an assignment of error on the record. We therefore do not need to consider the further contention of the People that the question could only be raised by a writ of error sued out from the supreme court to the trial court.

The place where it is claimed the law was violated is the second story of the Powers Building at 423 South State Street, in Belvidere, which was admitted to be anti-saloon territory, being the same building the first story of which has recently been before this court and the supreme court in *the People v Powers* (____ Ill. App. _____. 283 Ill. 438.) The back yard of the building is enclosed by a high board fence and is entered through a gate. There is then an inclosed stairway to the second story, with a door at the bottom and another upstairs which are kept locked and the person entering must have a key. The principal evidence for the people was that of two detectives employed by the Anti-Saloon League, named Fred and Edward Armstrong. Fred Armstrong obtained a key to this room in another city and had a duplicate

...in support of the motion for a new trial. That a motion
for arrest may be so limited appears to be held in *Cummings v*
People 211 Ill. 388, on p. 401. Again, it does not seem to be
required in this court by an assignment of error. At the April
term 1916, we gave plaintiff error leave to assign an additional
error raising this question, but we were unable to find that he
did assign error upon the record, pursuant to that leave. It has
many times been held that the court can consider no errors except
such as are assigned upon the record, and that obtaining leave
to assign an additional error or filing with the court an
assignment of error does not amount to an assignment of error on
the record. We therefore do not need to consider the further
contention of the People that the question could only be raised
by a writ of error sued out from the supreme court to the trial
court.

The place where it is claimed the law was violated is the second
story of the Powers Building at 235 North State Street, in Baltimore,
which was assigned to be anti-saloon territory, being the same
building the first story of which was recently been before this
court and the supreme court in the *People v Powers* (____ Ill.
____, 233 Ill. 430). The back yard of the building is en-
closed by a high board fence and is entered through a gate.
There is a door in the fence leading to the second story, with a
door at the bottom and another opening which was kept locked and
the parcel entering must have a key. The principal entrance
to the house was out of two detectives employed by the anti-
saloon league, named Fred and Edward Harrington. Fred Harrington
obtained a key to this room in another city and had a duplicate

made for his brother. According to the proof for the People Fred went up first. met several men and among them Robert Sharp. He asked Sharp who was the proprietor and Shaw replied that Clark was, (pointing to plaintiff in error, who was near by,) but that he, Sarp, was helping out the old man, who was not very well. Part of the proof for the People was that this was within hearing of Clark, and part that it was not. Fred bought liquor of Sharp in the presence of Clark and paid Sharp for it. Fred then asked if he might bring up a friend, and that being permitted he went and brought up his brother. They each bought further drinks of Sharp in the presence of Clark, and Sharp testified that he paid the monty to Clark at the end of the day. Thereafter the two detectives attended there for several days at different times and bought whiskey and beer from Clark and from Sharp and paid therefor. As we understand it, their testimony is positive as to buying more ~~xxx~~ than thirty nine such drinks and paying either Clark or Sharp the efor. They also saw a number of drinks sold to other parties and paid for, which appeared to be in the same kind of receptacles as those from whtch they had obtained beer or whiskey. Clark denied that he had ever seen these detectives there or had ever sold them or any one else any liquor there, and denied that Sharp was his employe or servant. There were not thirty nine sales proven to have been made by Clark. If the jury believed the evidence for the people, Sharp sold liquor there in the presence of Clark and turned over the money to Clark and we think this sufficient proof that he was acting for Clark. The mayor testified that before this place was opened Clark came to him and said that he was going to start a locker club; that he was unable to do hard work and this would give him a chance to earn a living. This evidence tended to show

...for his brother. According to the record for the people
...went up first. and several men and among them Robert Sharp
...who was the proprietor and bartender that Clark
... (pointing to a witness in error, who was near by.) but that
... was helping out the old man, who was not very well.
... part of the proof for the people was that this was within hearing
... of Clark, and that that it was not. That doesn't depend on Sharp
... in the presence of Clark and said Sharp for it. That then asked
... to be right bring up a friend, and that being permitted he went
... and brought up his brother. They each bought further drinks of
... Sharp in the presence of Clark, and Sharp testified that he paid
... the money to Clark on the 21st day. Thereafter the two
... witnesses attended there for several days at different times
... and bought whiskey and beer from Clark and from Sharp and paid
... therefor. As is understood, their testimony is positive as to
... buying beer and then thirty nine each drink and saying either
... Clark or Sharp the door. They also saw a number of drinks sold
... to other parties and bottles and bottles, which appeared to be in the same
... kind of receptacles as those from which they had obtained beer
... or whiskey. Clark denied that he had ever seen these witnesses
... there or had ever sold them or any one else any liquor there,
... and denied that Sharp was his employee or servant. There were not
... thirty nine witnesses given to have been sold by Clark.
... If the jury believe the evidence for the people, Sharp sold
... liquor there in the presence of Clark and turned over the money
... to Clark and as Clark said and instant proof that he was selling
... for Clark. The jury testified that neither the place was
... opened Clark came to him and said that he was going to start a
... liquor place; that he was unable to do both work and this would
... give him a chance to earn a living. This evidence tended to show

him the ~~xxxxxxx~~ responsible head of the institution. The main defense was that these premises in the second story were occupied by The Sons of DeKalb, a club having a charter from the State of Illinois. It provided for a membership, each one of whom had a key to the building and owned a locker in which he kept beer or whiskey solely for his own individual use. Clark was the steward of that club and in charge of it. The beer was almost entirely that of the Aurora Brewing Company and delivered by the Fox River Express Company, and the whole scheme was substantially that described by us in People v Gilmore, 196 Ill. App. 148. See the same case in 273 Ill. 143. A bookkeeper of the Aurora Brewing Company was a witness for defendant and his testimony showed an intimate connection between the brewing company and this club. The court permitted much evidence for Clark as to the organization and management of the club, but did restrict that proof to some extent. If the question were whether the club had violated the law, it may be that the proof on that subject was unduly restricted. It was evidently the view of the trial court that the guilt or innocence of Clark under the proof did not involve the question whether the club had violated the law, and in this we hold that the court was correct. The proof introduced by Clark showed that frequently the lockets would not hold all the beer and whiskey that a member had ordered, and that in such case, after the member's locker was filled, the rest was put into a certain room of which the steward had charge. If this was true, then it was from that surplus stock that sales were made by Clark and by Sharp. If Clark sold such beer and whiskey and received pay for it, he is just as guilty of violating the law as if there had been no club, and it was immaterial how the business was conducted with the members of the club. The jury and the trial

him the xxxxxxxx responsibility of the institution. The
main defense was that these premises in the second story were
occupied by The Home of Daniel, a club having a charter from the
State of Illinois. It provided for a membership, each one of whom
had a key to the building and owned a locker in which he kept
beer or whiskey solely for his own individual use. Clark was
the steward of that club and in charge of it. The beer was
almost entirely that of the Aurora Brewing Company and delivered
by the Fox River Express Company, and the whole scheme was sub-
stantially that described by us in People v. Gilmore, 185 Ill.
App. 180. See the same case in 275 Ill. 123. A bookkeeper of
the Aurora Brewing Company was a witness for defendant and his
testimony showed an intimate connection between the brewing
company and this club. The court permitted much evidence for
Clark as to the organization and management of the club, but
it resisted that proof to some extent. If the question were
whether the club had violated the law, it may be that the
proof on that subject was mainly resisted. It was evidently
the view of the trial court that the guilt or innocence of Clark
under the proof did not involve the question whether the club
had violated the law, and in this we hold that the court was
correct. The proof introduced by Clark showed that frequently
the locked room would hold all the beer and whiskey that a
member had ordered, and that in such cases, after the member's
locker was filled, the rest was put into a certain room or which
the steward had charge. If this was true, then it was from
that surplus stock that sales were made by Clark and by others.
If Clark sold such beer and whiskey and received pay for it,
he is just as guilty of violating the law as if he had
been no club, and it was immaterial how the business was con-
ducted with the members of the club. The jury and the trial

judge believed the witnesses for the People and if their evidence is true, Clark was properly found guilty.

The People did not call Sharp till rebuttal, and he testified to some matters that should have been offered in chief. He was competent in rebuttal in certain matters, and we are not disposed to hold that it was reversible error in this case to permit him to testify for the People to that which properly should have been introduced in chief. Sharp was an accomplice, and defendant requested an instruction that the jury could not convict on the evidence of an accomplice alone. The court refused the instruction. It was taken substantially word for word from Hoyt v People 140 Ill. 588. If conviction had been sought upon the evidence of Sharp alone, the instruction should have ~~gt~~ been given. The conviction was chiefly upon the evidence of the two detectives, and we think this instruction was properly refused because it tended to indicate to the jury that the conviction was sought on the evidence of Sharp alone. In the Hoyt case the conviction was sought mainly on the ~~gross~~ evidence of accomplices. The newly discovered evidence presented under the motion for a new trial was cumulative only and not conclusive.

The court imposed a separate judgment under each count the net result of which was imprisonment in the county jail for 240 days and fines aggregating \$2,950. and defendant was ordered to pay the costs and it was ordered that if, at the end of the jail sentence, the fine and costs are not paid, Clark should stand committed to the county jail till such fine and costs are paid at the rate of \$1.50 per day. The amount of the costs is not shown, but is stated in Clark's brief to be \$700. Omitting the costs, the total imprisonment under this judgment if Clark should be unable to pay the fine and costs, would be over six years. He was sixty five years old when tried. The evidence

judge believed the witnesses for the People and if their

evidence is true, Clark was properly found guilty.

The People did not call Clark till a while, and he testified

to some matters that would have been offered in chief. He was

competent in regard to certain matters, and he did not object

to hold that it was reasonable error in this case to permit

him to testify for the People to what which properly should

have been introduced in chief. Clark was in accomplice, and he

testified regarding an instruction that was given, but could not

on the evidence of an accomplice alone. The court ruled the in-

struction. It was then established that Clark was not

v People 140 Ill. 252. If conviction had been sought upon the

evidence of Clark alone, the instruction would have been

given. The conviction was chiefly upon the evidence of the two

defendants, and we think this instruction was properly refused

because it tended to indicate to the jury that the conviction was

sought on the evidence of Clark alone. In the Hoyt case the

conviction was sought mainly on the sworn evidence of accomplices.

The newly discovered evidence presented under the motion for a

new trial was cumulative only and not conclusive.

The court refused a request to judgment under each count

the net result of which was judgment in the county jail for

240 days and fines aggregating \$2,000, and defendant was ordered

to pay the costs and it was ordered that it, at the end of the

trial sentence, the fine and costs were not paid, Clark should

stand committed to the county jail until such fine and costs are

paid at the rate of \$1.00 per day. The amount of the costs

is not shown, but is stated in Clark's bill to be \$70.00.

Omitting the costs, the total judgment under this judgment

is Clark should be committed to pay the fine and costs, would be over

his power. He was sixty days in jail. The sentence

tends to show that he is in poor health and not a man of means. This amounts very nearly to life imprisonment for a mere misdemeanor, and that for a first offence so far as this record shows, and it is based almost entirely upon the evidence of two detectives. If many other people bought liquor there, the detectives did not name them and the People did not call them as witnesses. It seems to us that the ends of justice do not require the infliction of so severe a penalty. We think it can be truly said of this punishment that it "is so wholly disproportioned to the offense committed as to shock the moral sense of the community," as expressed in *People v State Reformatory*, 148 Ill. 413, on p. 421, and in *City of Arcola v Wilkinson* 233 Ill. 250, on p. 254. In *People v Elliott* 273 Ill. 592, (a case like this) the court there said, on p. 602, "We regard the sentences as unnecessarily severe for the accomplishment of the purposes of the law." That language seems to us to apply to this case. The State denies that we have any power to interfere with the amount of the punishment. The jury did not fix the penalty. The contention of the State is that if the trial judge inflicts the severest penalty provided by law, where the offense is of the mildest character possible, no other tribunal can interfere with the severity of the sentence. In a civil case that question can be reviewed by the Appellate Court and we think that power of review ought to be lodged somewhere. We did assume the authority to correct an excessive judgment in *People v Esli McCanney*, 305 Ill. App. 91, and think it proper to apply that rule in this case.

We reverse the fines imposed under counts No. 1 to 20 inclusive, and so modify the order, that if the costs are not paid defendant shall stand committed to the county jail till

said costs are paid at the rate of \$1.50 per day, that said order shall not apply to the costs made by and taxed against the defendant. In all other respects the judgment is affirmed.

Reversed in part and affirmed in part.

Reversed in part and affirmed in part.
 Delivered. In all other respects the judgment is affirmed.
 shall not apply to the notes made by and taken against the
 said notes are paid at the rate of 11.75 per day. This said order

Reversed in out and filled in part.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT.
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6554

4304

AT A TERM OF THE APPELLATE COURT, 211 I.A. 605

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918 - the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1000-5-1 2000

THE STATE OF NEW YORK, in SENATE,
January 1, 1900.

REPORT

OF THE
COMMISSIONERS OF THE LAND OFFICE,
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE,
JANUARY 1, 1899.

1900

ALBANY: PUBLISHED BY THE
UNIVERSITY OF THE STATE OF NEW YORK,
1900.

Gen. No. 6554.

Samuel H. Potter, appellee

vs

Appeal from Iroquois.

C. C. C. & St. L. Ry. Co.

appellant.

Dibell, P. J.

During the night following December 27, 1915, a number of horses owned by Samuel H. Potter got through a gate in a right of way fence maintained by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and two of them were killed by a freight train. In the following November Potter brought this suit against the railway company to recover the value of the horses so killed and filed a declaration, which besides stating the facts which made it the duty of the railway company to maintain the gate and fence, alleged that said fences were not suitable and sufficient to prevent horses from getting upon the railroad, and that the gate was not suitable and sufficient for that purpose; and the consequent escape and killing of the horses. Defendant filed the general issue, the cause was tried without a jury and there was a finding and a judgment for plaintiff for \$500.00 from which judgment defendant appeals. It is not contended that the judgment is excessive, if plaintiff is entitled to recover.

The gate was of the type known as a slide gate, as distinguished from a gate hung on ordinary hinges. There was an upright piece near each end and a top board and a bottom board nailed to each upright, and another board extending from the foot of the opening part of the gate at the bottom to the top board at the other end. The proof tended to show that it was so put on that it had no value as a brace. Wire netting was nailed over this frame. At the opening end were two posts a few inches

Gen. No. 8324.

Samuel H. Potter, appellee

Appeal from Circuit Court.

vs

C. C. C. & St. L. Ry. Co.

Appellant.

Dubois, P. J.

During the night following December 27, 1915, a number of horses owned by Samuel H. Potter got through a gate in the line of way fence maintained by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and two of them were killed by a freight train. In the following November Potter brought this suit against the railway company to recover the value of the horses so killed and filed a declaration, which declares stating the facts which make it the duty of the railway company to maintain the gate and fence, alleged that said fences were not suitable and sufficient to prevent horses from getting upon the railroad, and that the gate was not suitable and sufficient for that purpose; and the consequent escape and killing of the horses. Defendant filed the general issue, the cause was tried without a jury and there was finding and a judgment for plaintiff for \$500.00 from which judgment defendant appeals. It is not contended that the judgment is excessive, if plaintiff is entitled to recover.

The gate was of the type known as a slide gate, as distinguished from a gate hung on a heavy hinge. There was an upright piece near each end and a top board and a bottom board nailed to each upright, and another board extending from the foot of the mounting part of the gate at the bottom to the top board at the other end. The proxy tended to show that it was put on that it had no value as a proxy. The finding was relied over this finding. At the opening and when the gate is the horses

apart and a cleat was nailed across these, perhaps four feet from the ground, and the top board extended a few inches beyond the upright part thereof and the gate was closed by placing this projected part of the top board over said cleat and between said posts. The gate was suspended at the other end in a similar way, except that the post on the side towards the farm was put further in the gateway than the post opposite it, so that the gate could be swung open into the right of way, but could not be opened into the field. If those posts at the hinged end had been put in exactly the other way, the gate could not have been swung into the right of way and could not have been opened by animals in the field. At the opening end the cleat was so high that the gate, when closed, did not rest upon the ground. The top board was old cracked and broken. It was worn smooth and the cleat upon which it rested was worn smooth and this made it easier for an animal rubbing against the gate to move the projecting board, so as to open the gate. The distance which the top board projected beyond the cleats and between the posts was slight, and if it had been much longer, it would have been much more difficult for an animal to open the gate. The post on the railroad side at that point was round, which aided in opening the gate with ease. This evidence warranted the court in finding that the gate was defective and insufficient to retain stock.

The day before about six inches of snow fell. The tracks of the horses were plainly visible in the snow at the gate and where they passed through. It is the theory of defendant that some hunter passed through this gate and left it open. There were no tracks of any human being in the snow, which was very strong proof that the horses opened the gate. Some six weeks after this accident one of these horses which was not killed was seen to open this gate by pushing or rubbing against it.

report and a cleat was nailed across them, perhaps four feet from the ground, and the top board extended a few inches beyond the upright part thereof and the gate was closed by placing this protected part of the board over the cleat and between said posts. The gate was supported at the other end in a similar way, except that the post on this side towards the lane was put further in the gateway than the post opposite it, so that the gate could be swung open into the right of way, but could not be opened into the field. If those posts at the hinges had been put in exactly the other way, the gate could not have been swung into the right of way and could not have been opened by pulling in the field. At the opening end the cleat was so high that the gate, when closed, did not rest upon the ground. The top board was old, cracked and rotten. It was worn smooth on the cleat upon which it rested and worn away on this side it easier for an animal rubbing against the gate to move the projecting board, so as to open the gate. The distance which the top board projected beyond the cleat and between the posts was slight, and if it had been much longer, it would have been much more difficult for an animal to open the gate. The post on the unfixed side at that point was round, which aided in opening the gate with ease. This witness examined the court in finding that the gate was defective and insufficient to rest in track. The day before about six inches of snow fell. The tracks of the horses were plainly visible in the snow at the gate and where they passed through. It is the theory of defendant that some hunter passed through this gate and left it open. There were no tracks of any human being in the snow, which was very strong proof that the horses opened the gate. Some six weeks before this accident one of these horses which was not killed was seen to open this gate by pushing or rubbing against it.

Within six weeks after this accident plaintiff signed two different statements which said, the first that the gate was left open by an unknown party and the second that plaintiff thought some one had slid the gate open and did not close it, as it would be impossible for horses to open the gate. These statements were prepared by persons in the employ of defendant and plaintiff testified that when preparing these statements, the agents talked much to him and that he understood that they were about to settle with him for the horses and he looked it over hastily and did not know that it contained these statements when he signed it and that he did not say those things to the agents and that they were not true. These statements were proper to be considered by the court as affecting the testimony of plaintiff. It is plain from the entire statements that he did not mean that he had seen any one leave the gate open at that time nor that any other person had seen it left open and told him of it, but only that that was the opinion he then entertained. There is nothing to show that the court did not give due weight to these statements and it is evident that the court nevertheless believed that the horses did open the gate because of its defective condition.

The editor of a local newspaper interviewed plaintiff and others and published an article which in effect stated that plaintiff thought that careless hunters left the gate open. It is argued that the court erred in refusing to admit that article in evidence. The editor who wrote it was a witness and he testified in effect that at the time he interviewed plaintiff and others, but that he could not then remember from whom he got the information above referred to. It is obvious that it was competent for him to testify in behalf of defendant to anything plaintiff said, but that the article was incompetent. Plaintiff and two neighbors

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4

had caused a notice, signed by them and warning hunters from being upon the premises, to be posted along the railroad a half mile from the place of the accident. The court properly refused to admit that notice in evidence. Defendant offered several propositions of law. Some of these the court marked held but not sustained by the evidence, and that holding we find to be correct. Another was properly refused and others were properly modified. One witness for defendant had testified that he passed by there at three o'clock of the afternoon of the preceeding day and the gate was then closed. Defendant offered a proposition that the burden was upon the plaintiff to show that the gate was opened after three o'clock of that day. The court so modified the proposition as to omit the reference to the hour. As offered, the proposition was equivalent to saying that the testimony of the witness was unqualifiedly true. This is not a proposition of law but of fact, and it was not the duty of the court to make that finding upon that side issue. The witness was cross examined and it was for the court to weigh and consider his testimony on direct and cross examination with all the other evidence in the case and to give it such weight as it was entitled to. It was manifestly true that if the court believed that witness told the truth and was correct as to the hour, then it was necessary for plaintiff to prove that the gate was opened afterwards.

The judgment is affirmed.

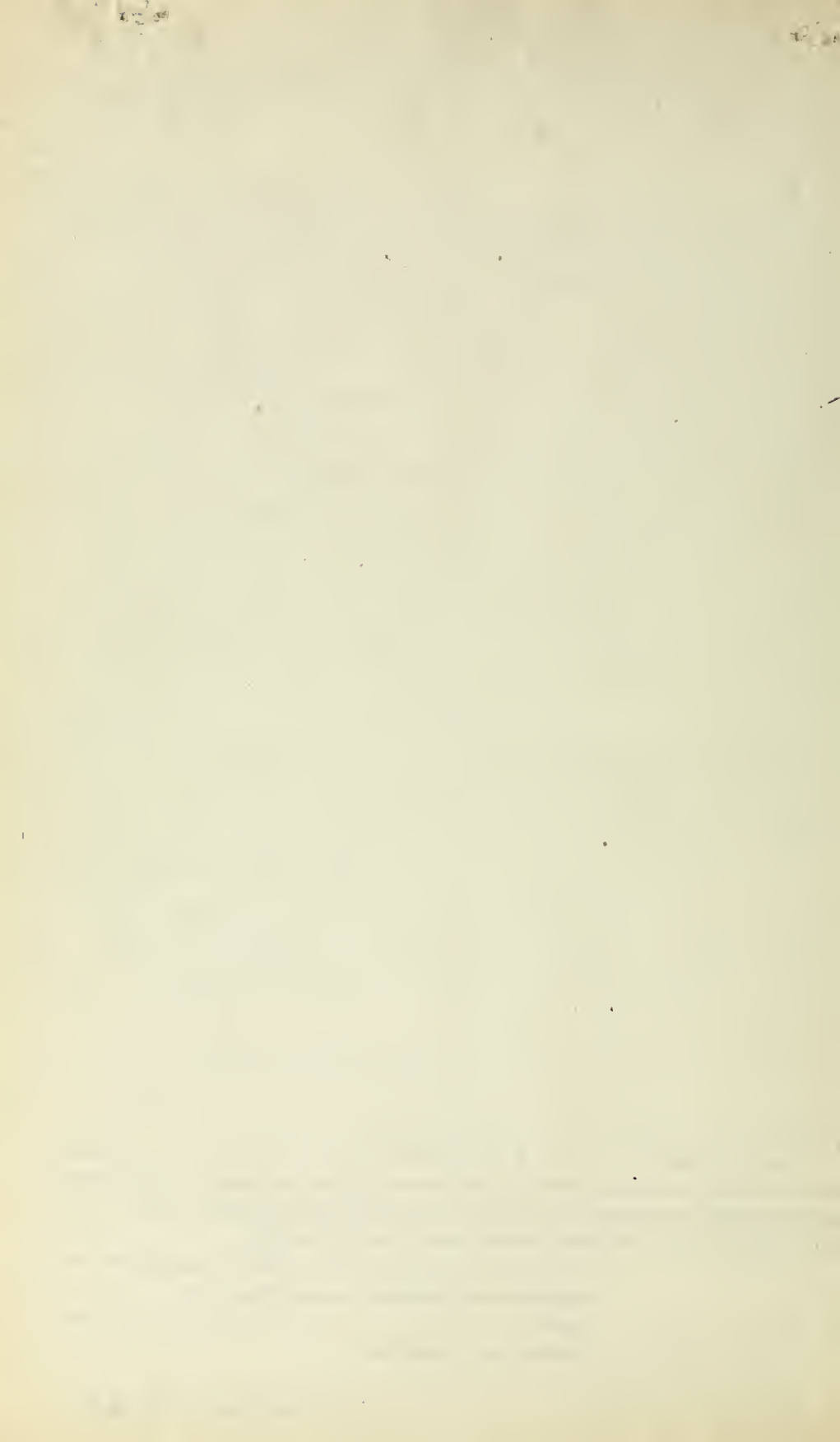
and several notices, signed by them and warning hunters from being on the premises, to be posted along the railroad a half mile from the place of the accident. The court properly refused to admit that notice in evidence. Defendant offered several propositions of law. Some of them the court refused to admit but not all. The evidence, as that holding we find to be correct. Another was properly refused and others were properly admitted. The witness for defendant had testified that he passed by there at three o'clock on the afternoon of the preceding day and the case was then closed. Defendant offered a proposition that the witness was upon the plaintiff to show that the gate was closed after three o'clock of that day. The court admitted the proposition as to admit the reference to the hour. As offered, the proposition was equivalent to saying that the testimony of the witness was unqualifiably true. This is not a proposition of law out of fact, and it was not the duty of the court to take that finding upon that side issue. The witness was cross examined and it was for the court to weigh and consider his testimony on direct and cross examination with all the other evidence in the case and to give it such weight as it was entitled to. It was manifestly true that if the court believed that witness told the truth and was correct as to the hour, then it was necessary for plaintiff to prove that the gate was closed afterwards.

The judgment is affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6560

4305

211 I.A. 607

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. [✓]DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918 • the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6560

Daniel Jenkins, appellee

vs

Appeal from Peoria.

Crescent Auto Co. appellant.

Dibell, P. J.

The Crescent Auto Company is a corporation having its principal place of business in Peoria. On April 5, 1917, it had three stockholders, who were also directors and officers. Knudson owned four fifths of the stock and was secretary. Eckley was treasurer and owned one tenth. Ryan was president and owned one tenth. They often called each other partners. Knudson and Eckley were sales agents. Ryan ran the repair shop. They had a sub-agent at Pekin. Jenkins lived in Pekin and had an old Mitchell car and wished to buy a new Elgin car and turn in his old car. The sub-agent failed to be able to make a contract with Jenkins. Knudson went to Pekin and made a contract with Jenkins. It was partly oral and partly written. A printed blank, apparently designed to be signed by the purchaser, was partly filled out so as to indicate the name and style of the car purchased and the price, and it contained also the following: "We hereby guarantee to sell Daniel Jenkins' Mitchell within 60 days from date for the sum of \$300.00. The title to said Mitchell to remain in Mr. Jenkins until sold. When sold the cash to be refunded to Mr. Jenkins." The secretary signed this paper and delivered it to Jenkins and Jenkins gave the secretary \$950 and delivered to Jenkins a used Elgin car, which was to be replaced in a few days by a new car and which was so replaced. Afterward trouble arose between Knudson and the other officers of the company and Knudson sold out to Ryan and left the company. Thereafter Eckley went to Pekin and got the Mitchell car and placed it in the company's

Daniel Jenkins, Appellant
vs
Appellee from Mexico.

Crescent Auto Co. Appellee.

Dated, P. M.

The Crescent Auto Company is a corporation having its principal place of business in Mexico. On April 5, 1917, it had three stock-holders, who were also directors and officers. Knudson owned four-tenths of the stock and was secretary. Eokley was treasurer and owned one-tenth. Ryan was president and owned one-tenth. They often called each other partners. Knudson and Eokley were sales agents. Ryan ran the repair shop. They had a sub-agent at Peking. Jenkins lived in Peking and an old Mitchell car was used to buy a new Eight car and turn in his old car. The sub-agent failed to be able to make a contract with Jenkins. Knudson went to Peking and made a contract with Jenkins. It was partly oral and partly written. A printed blank, apparently designed to be signed by the purchaser, was partly filled out so as to indicate the name and style of the car purchased and the price, and it contained also the following: "We hereby guarantee to sell Daniel Jenkins' Mitchell within 60 days from date for the sum of \$500.00. The title to said Mitchell to remain in Mr. Jenkins until sold. When sold the cash to be refunded to Mr. Jenkins." The secretary signed this order and delivered it to Jenkins and Jenkins gave the secretary \$250 and delivered to Jenkins a new Eight car, which was to be replaced in a few days by a new car and which was to be replaced. Afterwards trouble arose between Knudson and the other officers of the company and Knudson sold out to Ryan and left the company. Then after Eokley went to Peking and got the Mitchell car and placed it in the company's

garage. When the sixty days were up it had not been sold. Jenkins demanded the \$300 of the company and after numerous interviews and various promises which were not performed, he sued the company before a justice and had a judgment for \$300. Defendant appealed to the circuit court where the cause was tried without a jury and plaintiff again had a judgment for \$300. Defendant now appeals to this court and sets up two defenses.

Defendant contends that it had no power to give the foregoing guarantee and that Knudson had no power to execute such a guarantee if the company could. The charter of the company gives it about all the power to sell, trade, barter and exchange automobiles which words can express. The bylaws provided that the secretary perform such duties as the board of directors shall prescribe. The company has no record of any order prescribing any duties to be performed by the secretary. But the defendant proved that Knudson was a sales agent. It kept and cashed the check that Jenkins gave it. It never asked to have its Elgin car returned. Very shortly thereafter Knudson informed Eckley of the agreement to sell Jenkins' old car. After Knudson had left, Eckley went to Pekin and got the old car and testified that he considered the company was under the moral obligation to try to sell it. There is proof that he thereafter repeatedly said that Jenkins was entitled to \$300. and that he should have it and that it would be paid. We hold that the company could not accept the results of the contract made for it by its officer, who owned four fifths of the stock, and yet repudiate that part of the agreement which was unsatisfactory to it. There was proof that Eckley was told there was a written contract, and that if he did not read it it was his own lack of attention. We conclude that the first point is not well taken.

We have carefully read all the evidence in the record

garage. Then the sixty days were up it had not been sold. Jenkins
 demanded the \$500 of the company and after numerous interviews
 and various promises which were not performed, he said the company
 before a justice and had a judgment for \$500. Defendant appealed
 to the circuit court where the case was tried without a jury
 and plaintiff again had a judgment for \$500. Defendant now
 appeals to this court asking up two judgments.

Defendant contends that it had no power to give the foregoing
 guarantee and that Knutson had no power to execute such a guarantee
 if the company could. The charter of the company gives it about
 all the power to sell, lease, barter and exchange automobiles
 which words can express. The bylaws provided that the secretary
 perform such duties as the board of directors shall prescribe.
 The company has no record of any other prescribing any action
 to be performed by the secretary. But the defendant proved that
 Knutson was a vice agent. It kept and cashed the check that
 Jenkins gave it. It never asked to have its sign or returned.
 Very shortly thereafter Knutson informed Foley of the agreement
 to sell Jenkins' old car. After Knutson had left, Foley went to
 Pekin and got the old car and testified that he considered the
 company was under some moral obligation to try to sell it.

There is proof that he thereafter repeatedly said that Jenkins
 was entitled to \$500. And that he should have it and that it would
 be paid. We hold that the company could not accept the results
 of the contract made for it by its officer, who owed four fifths
 of the stock, and yet repudiate that part of the agreement which
 was unnecessary to it. There was proof that Foley was told
 there was a written contract, and that if he did not read it it
 was his own lack of attention. We conclude that the first point
 is not well taken.

We have examined the record and find that the

and we conclude that the real arrangement was as follows. The scheduled price of the Elgin car was \$985. Jenkins was unwilling to pay so much and he wished to turn in his old car at \$300. He had previously been offered that sum for it. He told this to Knudson and Knudson went with Jenkins to the garage where it was kept and examined the old car and said it was worth \$300. But Knudson told Jenkins that they were soon to have a lot of new cars come in and needed the money very much, and finally proposed to him that if, besides paying in cash all the price of the Elgin car except \$300, he would also loan or advance them \$300, they would put the price down to \$950 and would guarantee to sell the old car within sixty days for \$300 and then refund him that sum which he should so advance. To this Jenkins agreed. This explains the use of the word "refunded" in said ~~written~~ writing. If that had been simply an agreement to sell his car in sixty days for \$300 and the Elgin car was already paid for, the paper would naturally have been drawn to say that when the old car was sold, the company would pay him the proceeds. The word "refunded" is in harmony with the oral conversation between them. This is proved and is not disputed. Eckley testified to the moral obligation of the company and there is much proof that he promised to pay this \$300 when the sixty days were up and the car not sold. Eckley denies this but the preponderance is decidedly against him and the court believed the greater number of witnesses, and we see no reason for doubting the correctness of that conclusion. It follows that the true meaning of the entire transaction is that Jenkins loaned the company \$300 to be repaid within sixty days and it was not repaid. But defendant says that Jenkins still has his title to the car and also that the company put some repairs upon it. In our opinion when the defendant pays this judgment, it will be at least the equitable owner of the car and of the improvements

And we conclude that the real agreement was as follows. The included price of the Flinn car was \$2500. Jenkins was unwilling to pay so much and he wished to turn in his old car at \$300. He had previously been offered that sum for it. He told this to Knudson and Knudson went with Jenkins to the garage where it was kept and examined the old car and said it was worth \$300. But Knudson told Jenkins that they were soon to have a lot of new cars come in and needed the money very much, and finally proposed to him that if, besides paying in cash all the price of the Flinn car except \$300, he would also loan or borrow from \$300, they would put the price down to \$280 and would undertake to sell the old car within sixty days. The \$300 was then added to the sum which he should so advance. To this Jenkins agreed. This explains the use of the word "refunded" in the written writing. It that had been simply an agreement to sell his car in sixty days for \$300 and the Flinn car was already paid for, the paper would naturally have been drawn to say that when the old car was sold, the company would pay him the proceeds. The word "refunded" is in harmony with the oral conversation between them. This is proved and is not disputed. Eberly testified to the oral obligation of the company and there is much proof that he promised to pay this \$300 when the sixty days were up and the car not sold. Eberly denies this but the proposed verdict is definitely against him and the court believed the greater number of witnesses, and we see no reason for doubting the correctness of that conclusion. It follows that the use made of the entire transaction is that Jenkins loaned the company \$300 to be repaid within sixty days and it was not repaid. But Jenkins says that Jenkins still has his title to the car and also that the company got some repairs upon it. In our opinion when the relevant facts are judged, it will be at least the equitable owner of the car and of the improvements

which it has placed thereon, and it has possession of the car.

In this view of the proofs we fail to find any debateable rulings of the court upon the evidence or propositions of law which if they had been otherwise, could have resulted in a different judgment.

The judgment is affirmed.

which it has placed thereon, and its own possession of the car.

In this view of the facts, it is not possible

that the court upon the evidence or production of law which

it may have been otherwise, could have resulted in a different

judgment.

The judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6540

1307

211 I.A. 622

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. ✓ DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

JAN 6 1970

Gen. No. 6540

Henry W. Mahle, et al appellees

vs

Appeal from Stark.

Otto F. Mahle, et al.

(Otto F. Mahle, appellant.

Carnes, J.

The appellees, Henry W. Mahle, Mary Best, Ida Davidson, and Rose Ann Green, four of the five children of Ferdinand Mahle deceased, filed a bill asking a construction of his will making defendants his widow, and the appellant, the executor Otto F. Mahle, his other child. The defendants joined in an answer to which a replication was filed and a decree entered reciting that the case was heard by the chancellor on bill, answer and replication. Otto F. Mahle appealed to the supreme court where the cause was transferred to this court.

x It was alleged in the bill and admitted by the answer that Ferdinand Mahle, a resident of Stark County, Illinois, died in May 1915, leaving surviving Alvine Mahle, his widow, and said five children, his only ~~xxxx~~ heirs-at-law; that his estate ~~xxxx~~ consisted of eighty acres of land in Stark County and sufficient personal property so that \$1682.13 was left in the hands of the executor after payment of funeral expenses and debts that his will was admitted to probate in Stark County June 8, 1915, and Otto F. Mahle there qualified as executor, and filed a report June 30, 1916, showing a balance in his hands of \$1682.13, and the estate in the county court as fully settled except as to the distribution of that sum; that the will read as follows:-

" Last Will and Testament.

Ferdinand Mahle, of the Town of Essex, in the County of Stark

Gen. No. 0000

Henry F. Mahle, et al. Appellants

vs

Otto F. Mahle, et al.

(Otto F. Mahle, Appellee)

Grimes, J.

The appellee, Henry F. Mahle, Mary Mahle, Ida Davidson,

and Rose Ann Green, four of the five children of Ferdinand Mahle

deceased, filed a bill asking a declaration of his will

making defendant his wife, and the appellee, the executor

Otto F. Mahle, his co-defendant. The instrument located in an

answer to which a replication was filed and a decree entered

declaring that the said will was valid and the executor as such

answer and replication. Otto F. Mahle appealed to the supreme court

where the cause was transferred to this court.

It was argued in the bill and admitted by the answer

that Ferdinand Mahle, a resident of Cook County, Illinois, died

in May 1918, leaving surviving living wife, his widow, and six

living children, his only son being John Mahle; that his estate

was composed of real and personal property located in Cook County and

in Illinois; that the said Otto F. Mahle was left in the

charge of the executor with power of administration and that

that his will was admitted to probate in Cook County June 3,

1918, and Otto F. Mahle was appointed as executor, and filed

a report June 30, 1918, showing a balance in his hands of

\$1000.00, and the said Otto F. Mahle was duly settled

except as to the administration of said will; that the will was

as follows:-

That Will and Testament.

Ferdinand Mahle, of the Town of Essex, in the County of Cook

and State of Illinois, made and published in the fifth day of September in the year of our Lord One Thousand Nine Hundred and Eleven.

In the name of God Amen. I, Ferdinand Mahle, of the Town of Essex, in the County of Stark and State of Illinois, at the age of 82 years and being of sound mind and memory, do hereby make, publish and declare this, my last will and testament, in manner following, that is to say.

First; It is my will that my funeral expenses and all my just debts be fully paid.

Second; I give and bequeath to my wife, Alvine Mahle, all my estate, both real and personal, of every kind and description, of whatsoever the same may consist, and wheresoever the same may be situated, for her maintenance and support, during her life time.

Third; I give and bequeath to my son, Otto F. Mahle after the death of my wife, Alvine Mahle, the land I now own, described as the North half of the Northwest quarter of Section No. Thirty six (36) in Township No. Twelve (12) North, Range No. Six (6) East of the Fourth Principal Meridian, in Stark County Illinois, containing Eighty ~~xxx~~ (80) Acres more or less, on condition that he shall pay the sum of Eight Thousand (\$8000) Dollars to the rest of my children as follows: To my daughter Ida Davidson, wife of James Davidson, of Atlantic Iowa, the sum of Two Thousand Dollars (\$2000) To my son, Henry W. Mahle, the sum of Two Thousand (\$2000) Dollars. To my daughter Mary Best, wife of William Best of Peoria County, Illinois, the sum of Two Thousand (\$2000) To my daughter Rose Ann Green, wife of William Green, of Princeville, Peoria County, Illinois, the sum of Two Thousand (\$2000) Dollars.

Fourth: I direct that the balance of my estate, if any be left at the death of my wife, Alvina Mahle, be then divided equally between my five children above mentioned, share and share alike.

Lastly: I hereby nominate and appoint my son, Otto F. Mahle, to be the executor of this, my Last Will and Testament, without bond, hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal, this 5th. day of September, in the year of our Lord, One Thousand Nine Hundred and Eleven.

SEAL.

Ferdinand Mahle."

that the will should be construed as vesting in Otto F. Mahle on the death of the testator a fee simple title in said eighty acres of land subject to the life estate of his mother, the widow, and subject to the lien of the other four children for the payment of said two thousand dollar legacies. cpl

It is averred in the bill that under a proper construction of the will said two thousand dollar legacies are due within one year after the death of the testator. The answer denies this construction and asserts that said legacies are due at the time of the death of Alvina Mahle, the life tenant, and not before. Whether this payment was required at the one time or the other is the only question presented to the trial court that we are asked to review. The pleadings present the question whether the \$1682.13 in the executor's hands should be paid to the widow with liberty to her to use the income and if necessary the principal for her maintenance and support, or should be paid to a trustee with directions to invest and pay the income to the widow during her life and the principal to the five children on her death. The chancellor held that the widow is entitled to the fund and ~~xxx xxx~~ to use the principal, if so necessary; and that cpl ed 2

Fourth: I direct that the balance of my estate, if any be left at the death of my wife, Alvin W. Hall, be then divided equally between my five children above mentioned, share and share alike. Lastly: I hereby nominate and appoint my son, Otto F. Hall, to be the executor of this, my last will and testament, without bond, hereby revoking all former wills by me made. In witness whereof, I have hereunto set my hand and seal, this 8th day of September, in the year of our Lord, One Thousand Nine Hundred and Eleven.

Testament Made at
Ottawa, Ont.

That the will should be considered as voiding in Otto F. Hall on the death of the testator in the event of his death during the term of land subject to the will estate of the testator, the widow, and subject to the risk of the other four children for the payment of all two thousand dollar indebtedness.

It is averred in the will that a proper construction of the will with the foregoing latter intention and the estate of the testator the death of the testator. The manner herein this construction and estate that will be subject to the testator of the death of Alvin W. Hall, the life tenant, and the widow. Under this system was intended as the one line of the other is the only question presented in the legal point that we are asked to review. The question presents the question whether

the testator's words should be held to be the same with liberty to her to use the income and if necessary the principal for her maintenance and support, or should be held to be limited to the interest and any income to the widow during her life and the principal to the four children on her death. The question here is whether the widow is entitled to the

construction is not here objected to. There was also an allowance to complainants of solicitors fees to be paid out of said moneys in the hands of the executor; but that is not here questioned. Appellant in his brief says: "There is no dispute as to the vesting of title in appellant subject to the life estate of the surviving widow, Alvine Mahle, or that the legacies are vested and a charge upon the real estate devised to Otto F. Mahle. The only dispute is as to the time of payment of said legacy of \$2000 to each of the four "legatees (appellees)"

And again, "in this cause it is agreed by all parties that the title vested in Otto F. Mahle, devisee, subject first to the life estate of Alvine Mahle, who still survives; that the legacies are also vested in favor of the legatees; that their payment is charged on the land devised to said Otto F. Mahle, but the time of payment of said legacies is a vital point of difference." Appellees in their brief say "the only question before this court is as to the time of payment of these legacies", and that they contend "they are payable not later than one year after the probate of the will and issue of Letters."

The decree found the title in accordance with the construction adopted by all the parties; found that no time was named in the will for the payment of said two thousand sums; that payment was required one year after the issue of Letters Testamentary to appellant, and ordered him to pay said sums with interest at five per cent, from one year after the date of Letters Testamentary, and to make such payment within ninety days, and directed that in case appellant should fail to pay said sums or to sell said land for the payment of the same, that the master in chancery should sell the land and pay said legacies out of the proceeds, and pay the balance remaining to appellant.

The chancellor evidently adopted the construction of the will insisted upon by all the parties to the suit insofar as they agreed and after adopting that construction we see no ground to question his conclusion as to the time of payment of the two thousand dollar sums. Appellant suggests that under the third clause of the will he was given said land "after the death of my wife" on condition that he pay said sums aggregating eight thousand dollars, and therefore it was not intended that he should pay them until after the death of the widow. There would be force in this suggestion in the absence of the admission that appellant took title to the land at the time of the testators death. On his theory of the case he then took a present title to an interest in remainder in the eighty acres of land, subject to the lien for the payment of the two thousand dollar legacies. He insists in the trial court and here that those legacies vested on the death of the testator and that it then became his duty to pay them at some time. We see nothing in the will so construed deferring the payment until appellant should get possession of the property devised him. An estate in remainder is property subject to transfer, sale and mortgage like other property. We are of the opinion that the construction agreed to by the parties and adopted by the court is not correct.

There is much room for contention that the widow under the second clause of the will took the real estate as well as the personal property, with the right to use the income and consume the principal, if necessary, for her maintenance and support; that said words above quoted "after the death of my wife" have the effect to postpone the vesting of the remainder in appellant until after the widow's death; that the devise to appellant of the land amounts only to an offer if he sees fit, after the death of the widow, to accept and comply with the conditions. Under that construction he could not be required to pay anything before

The Chancellor willingly adopted the construction of the will
involved upon by all the parties to the suit insofar as they agreed
and after stating that construction he was not bound to question
his conclusion as to the time of payment of the two thousand
dollar sum. He pointed out that under the will the wife of
the testator was given said sum and that the death of the wife
on condition that he pay her such sum at the time of her death
belonged to the testator and he was not intended that he should pay
them until after the death of the wife. There would be force
in this suggestion in the absence of the provision that the testator
took title to the land at the time of the testator's death. On his
theory of the case he took back a payment made to an interest in
real estate in the right of the wife of the testator at the time
for the payment of the two thousand dollar sum. He pointed
out that the trial court and that those learned judges on the
death of the testator and that it then became his duty to pay them
at some time. He was nothing in the will as construed referring
the payment until appellant should get possession of the property
involved etc. He stated in testimony that it was subject to
transfer, sale and mortgage like other property. He said of the
opinion that the construction agreed to by the parties was adopted
by the court in the last case.

There is much more in the construction of the will and the
second clause of the will that has been agreed to by the parties
personal property, and that it is to be paid to the widow and her heirs
the principal, if necessary, for her maintenance and support;
that said words above quoted "after the death of my wife" have
the effect to postpone the payment of the sum until the appellant
until after the wife's death; that the words in question are
and said amount only to be paid to the widow, after the death
of the husband, to support and comfort the widow and her heirs
that construction is given and he pointed out that the construction

the widow's death. She might necessarily consume all the property real and personal, in her lifetime, or so much of it that it would not be advantageous for appellant to accept the devise and comply with the condition. This construction would have been advantageous to the widow and disadvantageous to all other parties to this suit and particularly to appellant. All parties were adults and before the court. They agreed in their pleadings that the will was not capable of that construction. If they were wrong and it was the privilege of the chancellor to give the will a construction contrary to all their contentions if he saw fit to do so, still appellant cannot complain here that the chancellor adopted his view of the law. He does not here so complain, but on the contrary argues, as above noted, that the chancellor was right except as to the time of payment. We conclude that there is left no duty on this court to investigate and decide questions of law upon which all the parties agree. In a jury trial a verdict based on an incorrect proposition of law is not for that reason disturbed if both parties are responsible in their instructions offered and given for the error committed by the court. A party has no right to complain of an error in his opponent's instructions when a like error appears in an instruction given at his own request. West Chicago St. R. R. Co. v Buckley, 300 Ill. 260; O'Rourke v Spröul 147 Ill. App. 809, and authorities cited in those cases. A party who has with knowledge of the facts assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. 18 Cyc. 796, et seq. and authorities there cited; See also The People v Vaughan, 223 Ill. 163, 165. Assuming a construction of that part of the will agreed to by all the parties, the conclusion of the chancellor logically and properly followed.

the widow's death. One might reasonably conclude all the property
real and personal, in her lifetime, or as much of it that it would
not be advantageous for her to have the property and thereby
with the condition. This condition would have been advantageous
to the widow and disadvantageous to all other parties to this suit
and particularly to appellant. All parties were adults and before
the court. They agreed in their pleadings that the will was not
capable of that construction. It was not shown that it was the
privilege of the executor to give the will a construction
contrary to all their contentions. It is not to be said, with
apparent propriety, that the executor was not to be bound by
view of the law. He was not free to construe, but he was
not to be bound, as above noted, that the executor was not to be
bound to the will of the testator. It remains that there is left no
duty on this court to investigate and decide questions of law upon
which all the parties agree. In a jury trial a verdict based on
an incorrect application of law is not for that reason invalid
if both parties are responsible in their pleadings or testimony
for the error committed by the court. A party has no right
to complain of an error in his opponent's pleadings when a
like error appears in an objection given to his own request.
West Chicago St. R. Co. v. Railway, 200 Ill. 250; O'Brien v.
Graham, 14 Ill. App. 802, and authorities cited in those cases.
A party who has no knowledge of the facts assumed a position
position in judicial proceedings is supposed to assume a position
known to him in relation to the position of the adverse party.
In Geo. 706, et seq. and authorities there cited; see also
The People v. Langdon, 100 Ill. 125, 126. Although a construction
of part of the will seemed to be all the parties, the non-
clusion of the executor's position was properly followed.

The decree seems to charge the executor, as such, with a duty to sell said eighty acre tract and pay said legacies. Appellant appealed both as executor and personally, and appears here in both capacities. He does not question that feature of the decree; therefore we will not attempt to discuss or decide whether the order should have been in that form.

There is no certificate of evidence. As before noted, the decree does not show that proofs were heard. The clerk of the court certified that oral evidence was introduced on the trial showing the value of the land devised to be about \$16,000. and a reasonable solicitors fee for complainant to be \$400. We do not see that such evidence, if it had been properly preserved would affect the conclusion here. But the law is so well settled as to require no citation of authority that oral evidence in a chancery case cannot in that way be preserved for review. Finding no reversible error in the record the decree is affirmed.

Decree affirmed.

There is no certification of witnesses. As before noted, the
T. The motion seems to require the production of the original
copy to sell with a copy with the original and the original
originals required with the original and the original
There is no question of the original. The issue has been decided by
the court; therefore, it is not a question of the original of the
whether the original should have been in that case.
There is no certification of witnesses. As before noted, the
T. The motion seems to require the production of the original
copy to sell with a copy with the original and the original
originals required with the original and the original
There is no question of the original. The issue has been decided by
the court; therefore, it is not a question of the original of the
whether the original should have been in that case.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6545

4308

211 I.A. 624

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. ✓DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, to-wit:

170 21 12

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 CHICAGO, ILL. 60637

6466

Gen. No. 6545.

Agenda No. 9.

Alfred S. Hillenbrand,
Defendant in Error,

-vs-

Error to LaSalle.

Edythe Hillenbrand,
Plaintiff in Error.

Carnes, J.

This writ of error is prosecuted by Edythe Hillenbrand, the defendant, in a bill for divorce filed in the circuit court of La Salle county by her husband, Alfred S. Hillenbrand, the defendant in error, The chancellor, on an ex parte hearing, entered a decree of divorce in favor of the complainant, granting him the custody of the minor children and dismissing the defendant's cross bill, and afterwards refused to vacate the decree and permit her to defend the cause and prosecute her cross bill on the merits.

The bill was filed December 29, 1916, alleging the marriage July, 1899, and cohabitation until October 4, 1914, charging wilful desertion from and after that date, and adultery of the defendant with one Ben Hagadone in October, 1914; alleging that three children (girls) were born of said marriage now aged respectively eight, twelve and fourteen years, all of them under the care of complainant's mother at her home in the city of Streator, and that defendant was unfit to have the custody of said children. She was served with summons and on January 18, 1917, she appeared by George F. Belford, and Browne & Wiley, attorneys of LaSalle county, and on January 29, 1917, filed her answer denying the charges of desertion and adultery, and that she was

denying the charges of assertion and adultery, and that she was of LaSalle county, and on January 29, 1917, filed her answer she appeared by George F. Belford, and Browne & Wiley, attorneys children. She was served with summons and on January 18, 1917, Streater, and that defendant was unfit to have the custody of said the care of complainant's mother at her home in the city of respectively eight, twelve and fourteen years, all of them under three children (girls) wereborn of said marriage now aged defendant with one Ben Hagadone in October, 1914; alleging that full assertion from and after that date, and adultery of the defendant, 1899, and cohabitation until October 4, 1914, charging with- The bill was filed December 29, 1916, alleging the marriage

cross bill on the merits. decree and permit her to defend the cause and prosecute her defendant's cross bill, and afterwards refused to vacate the ing him the custody of the minor children and dismissing the entered a decree of divorce in favor of the complainant, granting defendant in error. The chancellor, on an ex parte hearing, of La Salle county by her husband, Alfred S. Hillebrand, the defendant, in a bill for divorce filed in the circuit court This writ of error is presented by Edythe Hillebrand,

Case No. 1.

Edythe Hillebrand, Plaintiff in Error.

-vs-

Error to LaSalle.

Alfred S. Hillebrand, Defendant in Error.

en. No. 6545.

Agenda No. 9.

not a proper person to have the custody of said children. At the same date she filed a cross bill charging the complainant with wilful desertion from and after June 22, 1915, with extreme and repeated cruelty, and with adultery, setting out in detail various instances, times and places; averring her own poverty and the wealth of the complainant, praying for alimony, temporary and permanent, and divorce, and the custody of said children.

At the March term the case was noticed for trial by posting a notice in the courtroom (apparently under some rule or custom of the court) and several days thereafter- March 20, 1917- the complainant filed a replication to the answer and a verified answer denying the incriminatory allegations in the cross bill, and on that date the cause was called for trial on said pleadings. The defendant did not appear. Oral and documentary proof introduced by the complainant was heard and a decree for complainant entered reciting service on and appearance by the defendant in the original bill, and that the cause had theretofore been set by the court for trial on that day, finding the charges in the bill true; that defendant was guilty of wilful desertion and adultery, as charged, and is an unfit person to have the care and custody of said minor children; that the allegations in the cross bill are not true, granting the divorce and custody of the children as prayed in the original bill.

A certificate of evidence was filed, from which it appears that the complainant testified to facts supporting his charges of desertion and adultery, and offered in evidence a series of letters in the defendant's handwriting addressed to Ben Hagadone, which he had procured from the wife of Hagadone, Hulda Hillenbrand, the mother of complainant, testified that the family lived with her

At a proper time to have the money of said children. At the same date she filed a cross bill charging the complainant with wilful desertion from and after June 22, 1915, with extreme and repeated cruelty, and with adultery, and in detail various immorals, times and places; averring her own poverty and the want of the complainant, praying for alimony, temporary and permanent, and divorce, and the custody of said children.

At the March term the case was called for trial by posting a notice in the courtroom (apparently under some rule or custom of the court) and several days thereafter - March 30, 1917 - the complainant filed a replication to the answer and a verified answer denying the involuntary allegations in the cross bill, and so late the cause was called for trial on the day. The defendant did not appear. Oral and documentary proof introduced by the complainant was heard and a decree for complainant entered resting entirely on the appearance by the defendant in the original bill, and that the answer and replication were set by the court for trial on that day. Finding the charge in the bill true; that the defendant was guilty of wilful desertion and adultery, as charged, and is an unfit person to have the care and custody of said minor children; that the allegations in the cross bill are not true, granting the divorce on grounds of the original as prayed in the original bill.

A certificate of divorce was filed, from which it appears that the complainant testified to facts supporting his charges of desertion and adultery, and entered in evidence a series of letters in the defendant's handwriting addressed to her husband, which he had procured from the wife of defendant, under this name, the mother of complainant, testifying that she finally lived with her

for some months prior to October 3, 1914; that on that date the defendant went away without witness' knowledge and left the three children in the park from which place they came to her house; that she stayed away for more than a year and was in the northwest; that she went away to meet Hagadone and has never returned to live with her husband. Said letters were written in August, September and October, 1914. They occupy thirty-five pages of the record. They show beyond question that defendant was guilty of adultery with Hagadone and that she is not a fit person to have the custody of any girl from eight to fifteen years of age.

about six weeks after the decree was entered, but at the same term of court, the defendant appeared by H.M.Kelly, her solicitor, and moved to vacate the decree and to be heard on the merits, which motion was afterwards heard and overruled. A certificate of evidence heard on the motion was filed. It consisted of the affidavit of George F.Belford, to the effect that he had drafted the answer and the cross bill filed by the defendant; that he understood she relied upon Lee O'Neil Browne to try the case; that Browne was in the legislature and affiant did not know when the case could be reached for trial and had so informed his client; that shortly before the decree was granted affiant had been informed by complainant's brother that the matters had been settled and adjusted, and about that time was also informed that a decree had been granted without contest; that he afterwards learned that his informant had deceived him about the matter. Defendant's affidavit was also read to the effect that she had no notice that the case would be called for trial; was in fact quarantined in a house in Streator on the date of the hearing because her child was there sick with the measles; that she was not guilty of adultery with Hagadone or

for some months prior to October 3, 1914; that on the date the defendant was away without any attempt at knowledge and left the children in the care of their mother and she in the neighborhood; that she went away to meet defendant and has never returned to live with her husband. Data letters were written in 1914, 1915, 1916 and October, 1914. They occupy thirty-five pages of the record. They show beyond question the defendant was guilty of adultery with her husband and that she is not a fit person to have the custody of any child from eight to fifteen years of age.

About six weeks after the decree was entered, and at the same time of month, the defendant appeared by her attorney, Mr. [Name], and moved to vacate the decree and to be heard on the merits, which motion was afterwards denied and overruled. A certificate of judgment was entered on the motion was filed. It consisted of the following: Attest of George A. Sullivan, to the effect that he had advised the court and the record filed by the defendant; that he understood and relied upon the facts shown to the court; that he was in the legislature and a witness did not know when the case could be reached for trial and he so informed the court; that shortly before the decree was granted, the defendant had been advised by counsel, Plaintiff's brother, that the court had been advised and adjusted, and about that time he was so informed that a decree had been granted without contest; that he afterwards learned that the defendant had received him about the matter. The court's decision was also made to the effect that she had no notice that the case would be called for trial; was in fact maintained in a house in [Name] on the date of the decree because she did not think it wise to appear; that she was not guilty of adultery with defendant or

any other man; she reiterated the charges in her cross bill of adultery and misconduct on the part of the complainant, but did not deny writing said letters. Two other affidavits were read by the defendant tending to show the truth of the charges in her cross bill of cruelty of defendant in error. The defendant in error introduced the affidavit of his solicitor that the case was noticed for trial about eight days before it was called; that Mr. Wiley, of Browne & Wiley, was in the courtroom and was aware of the fact, and stated that he did not intend to appear. Said letters were again called to the attention of the court on this hearing.

Plaintiff in error argues here that the court should not have considered those letters on this motion, and that he should not have considered the affidavit of defendant in error's solicitor. The evidence heard on the trial was all before the chancellor on this motion; it was his duty to consider the motion in the light of what he knew about the pleadings, evidence and proceedings up to that time. We will not stop to discuss what weight he should have given to the affidavit of counsel as to the posting of notice of trial and opportunity of plaintiff in error's solicitors to know that the case was set and might be called for trial on the day named. In the ordinary course of the business of the court the chancellor may be presumed to know whether the case was called under such conditions and circumstances as to require counsel to respond. It is suggested that Mr. Browne was relied on to try the case. This may be assumed with the further assumption that the chancellor might have so presumed and might have known that Mr. Browne was in the legislature, but there were two other attorneys of his court appearing with Mr. Browne of record, and he would naturally presume when the case was set for

any other man; she reiterated the charges in her cross bill of
deliberate and malicious conduct on the part of the defendant, but did
not deny writing said letters. The other bill which was read
by the defendant tending to show the truth of the charges in
her cross bill of cruelty of defendant is error. The defendant
in error introduced the affidavit of the solicitor that the com-
plaint was noticed for trial about eight days before it was called;
that R. Wiley, or Brown & Wiley, was in the courtroom and was
aware of the fact, and stated that he did not intend to appear.
Said letters were again called to the attention of the court on
this morning.

Plaintiff in error says that the court should not
have considered those letters on that motion, and that she should
not have considered the affidavit of defendant in error's solici-
tor. The witness heard on the trial that II before the channel-
lor on this motion; it was his duty to consider the motion in the
light of what he knew about the charges, evidence and proceedings
up to that time. He will not ever to discuss what might be
shown have given to him the right of counsel as to the position
of notice of trial and opportunity of plaintiff in error's solici-
tors to know that the case was set and might be called for trial
on the day named. In the ordinary course of the business of the
court the chancellor may be presumed to know whether the case was
called under such conditions and circumstances as to require
counsel to respond. It is suggested that Mr. Brown was called
on to try the case. This may be connected with the further
assumption that the chancellor might have on remand and might
have known that Mr. Brown was in the courtroom, but there were
two other attorneys of his court appearing with Mr. Brown of
course, and he would be fairly presumed when the case was set for

trial and afterwards called for trial with no protest or request for postponement that no postponement was desired. No one of the three attorneys appearing for the plaintiff in error prior to the decree afterwards appeared for her and asked that it be vacated.

A motion to set aside a default or judgment is addressed to the sound legal discretion of the court, and, unless it appears the discretion has been wrongfully and oppressively exercised, a reviewing court will not interfere. *Constantine v. Wells*, 83 Ill. 192; *Scales v. Labar*, 51 Ill. 232; *Greenleaf v. Roe*, 17 Ill. 474. In the last cited case it is said ~~th~~ it must be a very gross and flagrant abuse of discretion that will warrant the revision and interposition of an appellate court. The authorities on this question are collected in *Kloepfer v. Osborne*, 177 Ill. App. 384, 392, from which it appears that a reasonable excuse must be shown for not having made the defense. Both diligence and merit must be shown, and it must appear that neither the defendant nor his attorney has been guilty of negligence. Affidavits filed in support of the application to open the judgment are construed most strongly against the party making the application. Counter affidavits were properly heard. *Hartford Life Ins. Co., v. Rossiter*, 196 Ill. 277. Want of diligence on the part of the attorney binds the client. *Eggleston v. Royal Trust Co.*, 205 Ill. 170.

There is no serious contention, and no room for contention, that the chancellor erred in granting the decree on the proof heard on the trial. The only question is whether he should have set aside the decree and permitted a trial on the merits. If she had been permitted such a trial and had proven her allegation of

trial and afterwards called for trial with no protest or request for postponement that no postponement was desired. In one of the three attorneys appearing for the inmate in error prior to the hearing afterwards appeared for her and stated that it was wanted.

A motion to set aside a default or judgment is presented to the court and legal discretion of the court, and, unless it appears the discretion has been wrongfully and oppressively exercised, a reviewing court will not interfere. *Constance v. Bell*, 53 Ill. 193; *Scates v. Lumber*, 51 Ill. 222; *Greenleaf v. Lee*, 17 Ill. 494. In the last cited case it is said that it must be a very strong and flagrant abuse of discretion that will warrant the reversal and interpretation of an appellate court. The question was collected in *Alonzo v. Osborn*, 177 Ill. App. 384, 393, from which it appears that a veritable exam may be shown for not having met the defense. Both diligence and merit must be shown, and it must appear that neither the defendant nor his attorney has been guilty of negligence. Affidavits filed in support of the application to open the judgment are construed most strictly against the party making the application. *Conner v. Affidavit* were properly made. *Wentford v. L. Co.*, v. *Wentford*, 190 Ill. 407. There is diligence on the part of the attorney since the claim. *Wentford v. L. Co.*, 190 Ill. 407.

There is no error in statement, and no room for contention, that the chancellor acted in granting the decree on the roof here on the trial. The only question is whether he should have set aside the decree and permitted a trial on the merits. It has been permitted such a trial and given her litigation of

extreme and repeated cruelty, it would not have been a sufficient incriminatory defense to the charge of adultery. (Stiles v. Stiles, 167 Ill. 576), and had she proven her charge of adultery it is not clear that she had not, by cohabitating with him after knowledge of the offense, condoned it. 7

We conclude there is not sufficient evidence of diligence of the plaintiff in error and her solicitors in prosecuting and looking after her case in the trial court to warrant us in disturbing the order of the chancellor refusing to set aside the decree; that there could have been no question that plaintiff in error was guilty of adultery as found in the decree whatever conceivable evidence she might have introduced tending to contradict or explain what was said in her letters to Hagadone, and that it was not clear that she was offering to produce evidence of her husband's misconduct that would be a sufficient incriminatory defense. The decree was, however, erroneous in awarding defendant in error the exclusive care, custody, control and education of said children free from any interference of the defendant without further providing that she should have the privilege of visiting the children, and fixing terms and conditions for such visits. (Zimmerman v. Zimmerman, 242 Ill. 552.) It follows that the decree should be affirmed except as to that provision, and as to that it is reversed and the cause remanded to the circuit court with directions to enter a decree in conformity with the views here expressed. 5

affirmed in part and reversed in part with directions.

...and repeated several times, it would not have been a sufficient
...to the court of inquiry. (Exhibit A)
...and the proven facts of inquiry
...it is not clear that she had not, by consulting with him after
...of the offense, committed it.

...there is no sufficient evidence of diligence
...the plaintiff in error and her solicitors in prosecuting and
...after her case in the trial court to warrant as in dis-
...the order of the chancellor refusing to set aside the
...that there could have been no question that plaintiff in
...error was guilty of adultery as found in the decree between con-
...evidence and light have introduced tending to contradict
...in her letters to Jackson, and that it
...not clear that she was offering to produce evidence of her
...that could be a sufficient imputation
...The decree was, however, erroneous in several respects
...error the exclusive care, custody, control and education of said
...of the defendant without further
...the privilege of visiting the
...and that the court has for said reason. (Exhibit
...It follows that the decree
...and as to the
...and the court is in full possession, and as to the
...and the court is in full possession, and as to the
...in conformity with the views here expressed.
...in part and reversed in part with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6558

4309

neg

211 I.A. 626

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. ✓ DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

8161 92 700

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5558.

John Davis, Plaintiff in error.

vs Errorto LaSalle.

St. Paul Coal Co. Defendant in error.

Carnes J.

John Davis, the plaintiff in error, was in January, 1914, injured while in the employ of the defendant in error, St. Paul Coal Company, as a mule driver in its coal mine. He brought this action on the case and filed a declaration good except that it contained no averment that the defendant was not operating under the provisions of the Workmen's Compensation Act of 1913. A demurrer to the declaration was sustained, and the plaintiff by leave of court amended his declaration by adding in each count an allegation to the effect that at and prior to receiving of his injuries the defendant had elected to reject the provisions of that act. This amendment was filed more than two years after the accident in question. The defendant filed a plea of the general issue, and a plea of the two year statute of limitations to the amended declaration. The court overruled plaintiff's demurrer to said plea of the statute. The plaintiff, electing to abide by his demurrer, his suit was dismissed and a judgment of nil dicit entered against him. He prosecutes this writ of error and says in his brief that the question presented is: "Does the original declaration state a good cause of action, without containing any reference to the Workmen's Compensation Act of 1913? If it does, the judgment should be reversed; If it does not, the judgment should be affirmed."

Plaintiff in error's brief was filed April 1, 1918, and that of the defendant in error April 30, 1918. Each party supports his contention with an able argument and citation of auth-

John Davis, Plaintiff in error.

vs
Bremer Lumber Co.

St. Paul Coll. Co. Defendant in error.

James J.

John Davis, the plaintiff in error, was in January, 1914, injured while in the employ of the defendant in error, St. Paul Coal Company, as a mule driver in its coal mine. He brought this action on the case and filed a declaration good except that it contained no averment that the defendant was not operating under

the provisions of the Workmen's Compensation Act of 1913. A demurrer to the declaration was sustained, and the plaintiff by leave of court amended the declaration by adding in each count an allegation to the effect that at and prior to receiving of his injuries the defendant had elected to reject the provisions

of that act. This amendment was filed more than two years after the accident in question. The defendant filed a plea of the general issue, and a plea of the two year statute of limitations to the amended declaration. The court overruled plaintiff's demurrer to said plea of the statute. The plaintiff, objecting to the judgment of his learned judge, has moved for a writ of error. His brief contains the following question presented:

"Does the original declaration state a good cause of action, without containing any reference to the Workmen's Compensation Act of 1913? If it does, the judgment should be reversed; if it does not, the judgment should be affirmed."

Plaintiff in error's brief was filed April 1, 1916, and that of the defendant in error April 20, 1916. Each party supports his contention with an able argument and citation of authorities.

orities. But after both briefs were filed part 1 of Volume 383 of our Supreme Court Reports was issued containing opinions in Beveridge v Illinois Fuel Co. 383 Ill. 31, and Barnes v Illinois Fuel Co. 383 Ill. 173, decisive of the question presented. Under the authority of those two cases we must hold that the original declaration did not state a good cause of action, and that the trial court did not err in overruling plaintiff's demurrer to the plea of the two year statute of limitations. That authority is so clear and controlling that we deem it unnecessary to notice or discuss earlier cases cited by counsel. The judgment is affirmed.

Affirmed.

criticism. But after both parties were filed part 1 of Volume 283
of our Supreme Court Reports and I read containing opinions in
Beverly v Illinois Fuel Co. 183 Ill. 31, and Barnes v Illinois
Fuel Co. 183 Ill. 175, Justice of the question presented. Under
the authority of those two cases we must hold that the original
jurisdiction did not state a good cause of action, and that the
trial court did not err in overruling plaintiff's answer to
the plea of the two year statute of limitations. That authority
is so clear and controlling that we deem it unnecessary to notice
or discuss earlier cases cited by counsel. The judgment is

affirmed.

Illinois.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6559

4310

211 I.A. 627

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen.No. 6559.

John Mosley, appellant.

vs

Appeal from Co. Ct. Peoria.

William Hundhausen, appellee.

Carnes J.

Appellant, John Mosley, sued William Hundhausen, appellee before a justice of the peace and had there a judgment for \$14.00 and costs of suit. The defendant appealed to the county court and had there a verdict on his counter claim for \$32.00 from which this appeal is prosecuted. Before the ~~trial~~ trial in the county court appellant filed a written statement of his demand as follows:

| | | |
|-----------------------------------|-----------------|---|
| "Four days work at \$2.00 per day | \$ 8.00 | |
| "Damage by water | \$ 10.00 | |
| "Loss of rent by delaying work, | \$ 75.00 | |
| | <u>\$ 93.00</u> | " |

And at the same time appellee filed a written statement of his set off as follows:

"To Hauling gravel for said Mosley at his request 32 ⁰⁰/₁₀₀ "

We presume these statements were filed in attempted compliance with section 19 of our Justices and Constables act (J & A 6915).

Each party testified on the trial and agreed that appellant was engaged in repairing a dwelling house where he had numerous workmen employed; that he contracted with appellee to do certain cement work about the premises; that it was appellee's duty under that contract to haul gravel upon the premises to be used in that work; that he did haul several loads of gravel there and appellant was offended because it was hauled at that time, declared the contract rescinded and ordered appellee to remove the gravel, which he sometime afterwards did, but they differ as to other provisions of the contract, appellant claiming that it was agreed that the cement work should ~~xxxxxxxxxx~~ not be commenced until the plasterers and other work was out of the way,

John Moley, Appellant.

Appeal from Co. Ct. Florida.

vs

William H. Hansen, Appellee.

Case No. 1.

Appellant, John Moley, and William H. Hansen, appellee, before a Justice of the Peace and had there a judgment for \$14.00 and costs of suit. The defendant appealed to the county court and had there a verdict on his counter claim for \$34.00 from which this appeal is prosecuted. Before the trial in the county court appellant filed a written statement of his demand as follows:

| | |
|-----------------------------------|-------------|
| "Four days work at \$3.00 per day | 12.00 |
| "Damage by water | 10.00 |
| "Loss of time by waiting work, | 12.00 |
| " | <hr/> 34.00 |

And at the same time appellee filed a written statement of his set off as follows:

"To hauling gravel for said Moley at his request 34.00"

We presume these statements were filed in attempted compliance with section 19 of our Statutes and Code of Civil Procedure (L & A 6812).

Each party testified on the trial and agreed that appellant was engaged in running a building house where he had numerous workmen employed; that he contacted with appellee to do certain cement work about the premises; that it was appellee's duty under that contract to haul gravel upon the premises to be used in that work; that he did haul several loads of gravel there and appellant was offended because it was hauled at that time, and that the contract required the ordered parties to remove the gravel, which he executed afterwards, but they differed as to other provisions of the contract, appellant claiming that it was agreed that the cement work should be commenced with the gravel and other work was out of the way.

and because appellee violated that provision of the contract was declared off and appellee agreed to remove the gravel within three or four days. Appellee denied this part of the contract and said the agreement was that he was to begin the work at once and while it was true that the contract was declared off and he was to remove the gravel, the agreement at that time was that appellant should pay him for such removal. Appellant introduced evidence tending to show that the gravel so left on his premises caused water to run into the basement injuring the building and delaying its completion, putting him to extra expense for labor and depriving him of the use of the premises for sometime. That evidence furnished grounds for a reasonable conclusion that appellant's premises were damaged and work delayed by the act of appellee in depositing and leaving the gravel where he did. We think also that it might be reasonably inferred from the evidence, taken as a whole, that no substantial damage to appellant resulted from that cause. Whether appellant or appellee should be believed as to the disputed terms of the contract, and whether substantial damages resulting from leaving the gravel on the premises more than three or four days, were fair questions for the jury involving consideration of facts within the common experience of a jury. If the contract was as appellee states, they were justified in allowing appellant nothing on his claim. We do not think the court erred in accepting the finding of the jury on the facts.

Appellant urges here that his action is in tort and therefore no counter claim is permissible. He did not object to the counter claim when filed, neither did he object on that ground to the evidence in support of it, but at the close of all the evidence he said to the court - "I would like to make a motion that the evidence of the defendant be stricken from the record, as a set-

and because appellant violated that provision as the contract was torn off and appellant agreed to remove the gravel within three or four days. Appellant denied this part of the contract and said the agreement was that he was to begin to work at once and while it was true that the contract was torn off and he was to remove the gravel, the agreement at that time was that appellant should pay him for such removal. Appellant introduced evidence tending to show that the gravel was left on his premises almost a year to two into the contract inuring the building and delaying its completion, putting him to extra expense for labor and material, but he of the use of the premises for sometime. That evidence furnished grounds for a reasonable conclusion that appellant's premises were damaged and work delayed by the act of appellant in depositing and leaving the gravel where he did. It is also that it might be reasonably inferred from the evidence, taken as a whole, that no substantial damage to appellant resulted from that cause. Whether appellant or appellant's agent is held liable as to the disputed terms of the contract, and whether substantial damages resulting from leaving the gravel on the premises were two three or four days, were left undisturbed for the party involved in the construction of the house the common knowledge of a jury. If the contract was as appellant stated, they were justified in allowing appellant to keep his gravel. He did not think the court erred in accepting the testimony of the jury on this point. Appellant urges that his action in not taking the gravel away no matter what is possible. He did not object in the contract claim when filed, saying it was only on that ground he was evidence in support of it, but he was aware of all the evidence he said to the court - "I would like to make a motion that the evidence of the defendant be excluded from the record, so a set-

off, with reference to the payment for this gravel." and the court said - "Motion overruled". Appellant in his bill of exceptions presented to and signed by the court and made a part of this record entitled the cause "Assumpsit". In his brief here he recites the acts of appellee upon which he bases his claim and says they were in violation of his, appellee's contract.

An action in contract is for the breach of a duty arising out of a contract either express or implied, and an action in tort is for the breach of a duty imposed by law. In the absence of common law pleadings it is often difficult to determine whether a particular action is the one or the other. There is an interesting discussion of this subject in Corpus Juris 1013, et seq. The author says if it is not clear to which class the action belongs it will ordinarily be construed as in contract rather than in tort. In the present case the amount involved is so small and the ends of justice so manifestly served by permitting the parties to settle their controversy in one action, that we are not inclined under the condition of the record, as above stated, to go minutely into an examination and discussion of authorities to determine whether the plaintiff's action was ex contractu or ex delicto. We conclude that the court did not err in treating the defendant's claim as properly presented and litigated under the provisions of section 18 of the Justices and Constables act. If it were clear from the record that appellant had filed a statement of a claim in tort and tried his case on that theory instead of pursuing the course that he did, a question might arise requiring more consideration.

The only instructions complained of are those given by the court of his own motion as to the form of the verdict, and the main objection urged as to those instructions is that the court informed the jury that the defendant was claiming a set-off.

off, with reference to the payment for this gravel." and the court said - "Motion overruled". Appellant in his bill of exceptions presented to and signed by the court and made a part of this record entitled the cause "Assumpsit". In his brief he recites the facts of the case upon which he bases his claim and says they were in violation of his, appellant's contract.

In action in contract it is for the breach of a duty arising out of a contract either express or implied, and an action in tort is for the breach of a duty imposed by law. In the absence of common law pleading it is often difficult to determine whether a particular action is the one or the other. There is an interesting discussion of this subject in *Corpus Juris* 1015, et seq. The court says it is not clear to which class the action belongs it will ordinarily be construed as in contract rather than in tort. In the present case the amount involved is so small and the ends of justice so manifestly served by permitting the parties to settle their controversy in one action, that we are not inclined under the condition of the record, as above stated, to so minutely into an examination and discussion of authorities to determine whether the plaintiff's action was ex contractu or ex delicto. We conclude that the court did not err in treating the defendant's claim as properly presented and litigated under the provisions of section 18 of the Judicature and Constabulary Act. If it were clear from the record that appellant had filed a statement of claim in tort and that he was on that theory instead of pursuing the course that he did, a question might arise respecting more correct statement.

The only instructions complained of are those given by the court of his own motion as to the form of the verdict, and the objection urged was that these instructions are that the court informed the jury that the defendant was claiming a set-off.

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It is argued that this was error because no set off could be permitted. What we have before said disposes of this contention. We find no reversible error in the record, therefore the judgment should be affirmed.

Affirmed.

It is argued that this error because not set off could be
 permitted. That we have before said in case of this contention.
 We find no reversible error in the record, therefore the judgment
 should be affirmed.

Affirmed.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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211 I.A. 630

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DOBRANCE DIBELL, Presiding Justice.

Hon. ~~DUANE~~ J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6561

Fred Kreeb, appellee

vs

Appeal from Woodford.

Lake Erie & Western

Railroad Company, appellant.

Carnes J.

This action on the case was brought by Fred Kreeb, the appellee, against the appellant railroad company to recover the value of four horses which had escaped from his field through a farm crossing gateway onto appellant's tracks where they were killed by a passing engine. The declaration charged failure of the defendant to construct a gate sufficient to prevent horses from getting upon the railroad at that point. Appellee had a verdict and judgment for \$575. It is not claimed that the verdict is excessive, but it is insisted that the gate was sufficient to turn ordinary stock and therefore a substantial compliance with appellant's statutory duty, and that the evidence does not affirmatively show that the horses got upon the track by reason of the insufficiency of the gate, but on the contrary tends to show it was left open by some third person. The court instructed the jury for the defendant that there was no presumption of negligence against the defendant merely by reason of the fact that the horses went upon the railroad right of way through the gate in question; that the burden of proof was upon the plaintiff to show that the gate was insufficient to turn stock when properly closed, and because thereof the horses of the plaintiff went through the gate; that if the gate was left open by some third person not connected with the defendant and without the knowledge of the defendant there could be no recovery; that if the jury found it was a sufficient gate that could be closed in such a manner as

Tred Kneeb, appellee

Appellant from below.

vs

Lake Erie & Western

Railroad Company, appellant.

Carrie J.

This action on the case was brought by Tred Kneeb, the appellee, against the appellant railroad company to recover the value of four horses which had escaped from his stable through a fair crossing gateway onto appellant's tracks where they were killed by a passing engine. The declaration charged failure of the defendant to construct a gate sufficient to prevent horses from getting upon the railroad at that point. Appellee had a verdict and judgment for \$275. It is not claimed that the verdict is excessive, but it is insisted that the same was arbitrary to turn ordinary stock and therefore a substantial compliance with appellant's statutory duty, and that the evidence does not affirmatively show that the horses got upon the track by reason of the inefficiency of the gate, but on the contrary tends to show it was left open by some third person. The court instructed the jury for the defendant that there was no presumption of negligence against the defendant merely by reason of the fact that the horses went upon the railroad right of way through the gate in question; that the burden of proof was upon the plaintiff to show that the gate was insufficient to keep stock when properly closed, and because thereof the failure of the plaintiff went through the gate; that if the gate was left open by some third person not connected with the defendant and without any knowledge of the defendant there could be no recovery; that if the jury found it was a sufficient gate that could be closed in such a manner as

to prevent stock from pushing it open, then the company had performed its duty under the law and was not required to place any lock thereon. And at the instance of the plaintiff that if they found from the evidence that the gate was so constructed that it would not be held closed and prevent opening by horses or cattle pushing against it, then it would not be a compliance with the law; that the duty of a railroad company to maintain gates at farm crossings is not complied with by building a gate too short for the opening, and if the gate was so constructed that when shut it would on pressure of ordinary horses swing open, then it was not a gate in compliance with the statutes.

There is no controversy about the law. The controlling question in the court below was, and here is, whether the evidence shows that the gate was insufficient. There is little difference in the evidence as to its construction. Appellant in its brief says it was constructed of boards 16 feet in length, 3 inches thick and 6 inches wide. There were five lengthwise pieces on the gate and they were held together by two uprights at each end and one in the middle. The gate was quite heavy and was supported by cross pieces extended between two posts located at the easterly end of the gate, and two posts set at the westerly end. In closing the gate it would be swung into position and then shoved in a westerly direction between the two posts at the westerly end and when closed it could only be opened by shoving the gate in an easterly direction, so that the westerly end of it would miss the east side of the westerly post. The opening between the two inner posts was 14 feet and 5 inches. The posts were 6 inches in diameter and when closed the westerly end extended in between the posts a distance of five or more inches. The gate when closed extended from four to seven inches beyond the posts set at the westerly end. In order to open the gate it was necessary to shove

to prevent stock from passing it when, then the company had per-
 mitted the stock to pass and was not required to close any
 lock station. And as the instance of the plaintiff and it was
 found from the evidence that the gate was so constructed that it
 would not be self-closing and prevent opening by horses or cattle
 pushing against it, then it would not be a compliance with the
 law; that the duty of a railroad company to maintain gates at their
 crossings is not complied with by building a gate that will not
 self-close, and if the gate was so constructed that when shut it
 would on pressure of ordinary horses swing open, then it was not a
 gate in compliance with the statute.

There is no controversy about the law. The controlling ques-
 tion in the court below was, and here is, whether the evidence
 shows that the gate was in compliance. There is little difference
 in the evidence as to its construction. Appellant in its brief
 says it was composed of boards 12 feet in length, 2 inches
 thick and 2 inches wide. There were five lengths of boards on
 the gate and they were held together by the nails at each end
 and one to the middle. The gate was quite heavy and was supported
 by cross pieces which crossed between the posts located at the western
 end of the gate, and the posts set at the eastern end. In closing
 the gate it would be swung into position and then shoved in a
 westerly direction between the two posts at the eastern end and
 when closed it could only be opened by shoving the gate in an
 easterly direction, so that the westerly end of it would meet the
 east end of the westerly post. The opening between the two
 inner posts was 12 feet and 2 inches. The posts were 6 inches in
 diameter and were placed 12 feet apart and extended in between the
 posts a distance of 15 feet 6 inches. The gate was closed
 extending from one to seven inches beyond the posts but at the
 westerly end. In order to open the gate it was necessary to shove

the same in an easterly direction a distance of from five to twelve inches before it would be permitted to swing toward the railroad track so as to make an opening. The gate when properly closed could not be opened except by pushing it in an easterly direction of at least five inches.

Appellee's claim is that the gate at the free end did not extend far enough between the posts to secure it from springing open if horses rubbed against it; that instead of extending seven inches it ought to extend farther - perhaps to twelve inches. This question was put to the jury to be determined by them from their common knowledge, and is ~~now~~ presented to this court to be here determined in the same manner. On the trial below appellee offered to prove a description of another gate at the farm crossing and stated that it might be material because he claimed the other gate was constructed according to law, and this gate was not. The court sustained appellant's objection that evidence as to another gate was not competent. This ruling of the court as to the question there passed on was correct, but we think it would have been competent for appellee to prove by expert witnesses what is considered a sufficient gate to turn ordinary stock, and how far the free end should project over the cross piece on which it rests when shut. No further attempt was made in this direction, and it does not seem to have been suggested in the court below and is not suggested here that the matter may not be properly determined from the common knowledge of the jury and the judges passing on the question. There are many cases in other jurisdictions, and some in this, where questions of what is and is not matter of common knowledge have been decided. Our supreme court has said "Courts will not be presumed to be more ignorant than the rest of mankind". (*Munn v Burch*, 25 Ill. 35, 38.) and "No proof is required of facts which everybody is presumed to know." (*C. E. & Q. R. R. Co. v Warner*, 102 Ill. 538, 546.)

the same in an easterly direction a distance of from five to
 twelve inches before it would be possible to walk toward the
 railroad track so as to make a crossing. The gate when properly
 closed could not be opened except by pushing it in an easterly
 direction at least five inches.

Appellant's claim is that the gate at the time and place
 not extend far enough between the posts to permit it from swinging
 open if horses rubbed against it instead of pushing it. Appellant
 even insists it ought to extend further - perhaps to twelve inches.
 This question is put to the jury to be determined by them from
 their common knowledge, and is not presented to this court to be
 determined in the same manner. On the trial below evidence
 was offered to prove a description of another gate of the same type
 and that it might be material because he claimed the
 other gate was constructed according to law, and this gate was
 not. The court sustained appellant's objection that evidence
 as to another gate was not competent. This ruling of the court as
 to the question stated placed on the record, but we think it
 would have been competent for appellee to prove by expert witnesses
 what is considered a standard gate so far as ordinary stock and
 not for the first and second except over the cross pieces on which
 it rests when shut. No further attempt was made in this
 direction, and it does not seem to have been suggested in the
 court below that it was competent to call the witness to say not
 be properly determined from the common knowledge of the jury and
 the judges sitting on the question. There are many cases in other
 jurisdictions, and even in this, where questions of what is
 and is not matter of common knowledge have been decided. Our supreme
 court has said "Courts will not be presumed to be more ignorant
 than the rest of mankind." (Quinn v. Burch, 103 Ill. 2d, 29.) and
 "No proof is required of facts which everybody is presumed to know."
 (C. H. & C. R. R. Co. v. Warner, 103 Ill. 2d, 246.)

There are many facts of common knowledge that the jury may find without expert evidence; as for instance, that the wheels of an automobile should be round and of the same height on opposite sides of the car; but expert evidence would be required to inform a jury as to the proper shape- and size of some parts of the engine. Farm gates of this general description are common in Illinois. It is perhaps a matter of common knowledge among farmers and other men engaged in building and using them how far the free end should extend between the posts to be reasonably safe from opening by pressure of stock against the middle of the gate. Perhaps this knowledge is so common that a judge should treat it as such and inform himself of the fact as he does in various matters of common knowledge, which he himself does not know, by consulting standard treatises and being advised by men familiar with that branch of knowledge. Facts may be of common knowledge and be treated as such on a trial though not within the knowledge of some well informed members of the community. If the proper construction of such a gate is in that class, it is still true that actual, accurate knowledge of how it should be made is much more likely to be found among country jurors than among judges of the courts.

We conclude that the case should be treated here as one submitted to the jury to determine the facts from their common knowledge; that the court committed no error in so submitting it because that method of trial was acquiesced in by counsel on both sides, and that it is not our duty to disturb the finding of the jury on the question of the sufficiency of the gate.

There is no evidence that the gate was opened by some person, or that anybody connected with this suit left it open except it shown from marks found on the ground that it was pushed back several inches and then pushed on the ground far

There are many kinds of common knowledge and the jury may find
without expert witness; as for instance, that the wheels of
an automobile should be round and of a certain height on opposite
sides of the car; but expert evidence would be required to inform
a jury as to the proper length and size of such parts of the
machine. This kind of knowledge is not a legal question and should be
settled by the jury. It is not a matter of common knowledge and should
not be left to the jury in deciding what is true and what is false.
and should be left to the jury to be reasonably safe from
erring by reason of a lack of knowledge of the facts of the case.
Perhaps this knowledge is so common that a jury should know it
as such and inform themselves of the facts as they are in various
kinds of common knowledge, which is not a legal question.
by consulting standard treatises and being advised by an expert
with that branch of knowledge. There may be of common knowledge
and be treated as such on a trial though not within the knowledge
of some well informed members of the community. If the proper
construction of such facts is in that sense, it is still true
that actual, accurate knowledge of how it should be made is
much more likely to be found in our country than in most
other of the world.

We believe that the case should be settled by the jury
submitted to the jury as a question of fact. From their common
knowledge, that the case should be settled by the jury on both
sides, and that it is not our duty to disturb the finding of the
jury on the question of the sufficiency of the facts.

There is no evidence that the facts were proved by any
person, or that anybody connected with this case left it open
except it should be left to the jury to decide what it was
proved by the evidence and then passed on the record for

enough open for horses to get through. Appellant argues that it could not have been so pushed back and dropped on the ground except by human agency, and therefore that it was not opened by the horses rubbing against it and ~~extinguishing~~ springing the boards; but if it had been opened by some man it seems probable that it would have been swung open clear from instead of scraping on the ground. The significance of these marks are again ~~likewise~~ something likely to be better understood by a jury in an agricultural community than by lawyers and judges. We are not inclined to disturb the jury's conclusion that the gate was not opened by some human agency.

Appellee's instructions are criticised. We have before stated the substance of all the instructions and are of the opinion that they fairly presented the question to the jury.

Counsel for appellee in his closing argument, commenting on the testimony given by one of the appellant's witnesses, said "He has to testify that way to hold his job. His living depends upon it." This statement was objected to as being improper and the court sustained the objection on that ground. It is urged here that notwithstanding that action of the court reversible error was committed by counsel in making that statement. This remark was improper, but we do not regard it reversible error. There is no question of an excessive verdict. It is held in *Collins v Sanitary District* 270 Ill. 108, citing authorities, that the matter of prejudicial remarks by counsel is one which should be left largely to the sound discretion of the trial judge, and it should be presumed that no misconduct of counsel materially prejudiced the opposite party unless its prejudicial nature is clearly shown by the record. In the present case counsel had the right to call the jury's attention to the fact that the witness was an employee of appellant and ask them to consider what effect that might have on his testimony, this on the ground

enough open for horses to get through. Appellant argues that it could not have been so burned back and located on the ground as to by which way, but Appellant says it was not burned by the horses moving. And it is not striking anything on the ground but it had been covered by some and it seems probable that it would have been open clear from instead of covering on the ground. The significance of these marks are again likely to be thin, likely to be better understood by a jury in an actual trial certainly than by laymen or judges. We are not inclined to disturb the jury's conclusion that the facts were not created by some human agency.

Appellant's instructions are criticized. We have before stated the substance of all the instructions and are of the opinion that they fairly presented the question to the jury.

Counsel for Appellant in his closing argument, commenting on the testimony given by one of the appellant's witnesses, said "He was to testify that way toward his job. His living depends upon it." This statement was objected to as being improper and the court sustained the objection on that ground. It is never true that notwithstanding the opinion of the court reversible error was committed by counsel in making that statement. This remark was improper, but we do not regard it reversible error.

There is no question as to an excessive verdict. It is well in Collins v. Railway District No. 1, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

that one may always show and discuss the interest of want of interest of a witness that the jury may determine whether his testimony is likely to be shaded by his interest. The remark complained of had no other or different effect from what might have been reached by a perfectly proper statement. Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

that can say I have seen and discuss the interest of want of in-
 terest of a witness that the Guy may have seen his
 testimony is likely to be aided by his interest. The remark
 complained of can be of no other or different effect from what might
 have been reached by a properly proper statement. Finding no
 reversible error in the record, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS.
SECOND DISTRICT.

} SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6577

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211 I.A. 643

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

George Yates,

Appellee,

-vs-

Appeal from Peoria.

John D. Phillips,

Appellant.

Carnes, J.

George Yates, the appellee, was in the employ of John D. Phillips, the appellant, as a farm laborer. They had a large, unbroken colt tied in the barn. Appellant directed appellee to lead her out into the yard for water. She was not halter broken and appellee said he could not do it alone. Appellant told him to get another rope and lengthen the halter and he would help him. This was done. As soon as the colt was untied it rushed out of the barn door with appellant and appellee both hold of the rope. When in the yard, struggling to hold the colt, appellant let go the rope. Appellee kept hold of it. Its loose end wrapped around his leg and he was drawn against a post in the yard and his leg broken, resulting in a permanent shortening. He brought this suit to recover for that injury, and on a jury trial had a verdict of \$5500, which, on appellant's motion, was set aside and a new trial granted. At the next trial he had a verdict of \$5000. A remittitur of \$2500. was entered and judgment entered against appellant for \$2500. It appears from the evidence that the injury was permanent only because of appellee's disobeying the order of the surgeon; therefore he was not entitled to recover for a permanent injury. The two verdicts were probably

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based on the assumption that he was entitled to compensation for such an injury. The remittitur cured that error and there is no suggestion that the judgment is excessive. But it is argued that appellant was not negligent; that appellee was negligent and disobeyed the order of appellant, and that the court erred in refusing instructions offered by appellant. >

Appellee's contention is that acting on the express order of appellant he attached a rope to the halter making the total lead seventeen or eighteen feet long; that appellant took hold of the end of the rope and directed him to take hold nearer the colt, which he did; that the colt rushed out of the barn and appellant without first giving him any warning let loose of the rope when they were about forty or fifty feet from some posts in the yard; that the end of the rope at once wrapped around appellee's leg and threw it against a post, causing the injury; that appellant in so letting go of the end of the rope without warning was guilty of actionable negligence. cf

There is little conflict of evidence as to the above facts except whether appellant warned appellee before letting go of the halter. Appellant testifies, that he told him to let go, but is not sure whether it was just before or just after he himself did so. Appellee testifies that he did not hear any such order. There is other evidence bearing on the question, but all considered it was within the province of the jury to determine from their own view of the weight of the evidence, and no such preponderance either way as to warrant a court in disturbing their finding. 7 We think also it was a question for the jury whether letting go

of the rope without warning was something that an ordinarily prudent man would not have done under the same or similar circumstances; that is, whether it was or was not negligence. With all the evidence of the surrounding circumstances considered reasonable men might well differ in their conclusion. The court did not err in refusing to direct a verdict. The trial court could not set aside the verdict merely because if on the jury he would have reached a contrary conclusion; but he could and should have set it aside if he considered the verdict manifestly against the weight of the evidence. He did not/^{so}consider it. Appellant's counsel call our attention to several cases announcing the undoubted rule that it is our duty to set the verdict aside by reversing the judgment if in our opinion it is contrary to the clear preponderance of the evidence. We would be more inclined to give weight to any impression we have that the conduct of appellant was that of an ordinarily prudent man under similar circumstances but for the verdict of two juries. It is a situation more familiar to men usually called as jurors than to men acting as courts. Laymen called from the body of the county may be presumed to have more familiarity with the subject of colts and their care and are therefore better qualified than lawyers to say what ordinary prudence requires. Apparently twenty-four jurors of the vicinity where these parties live called to express an opinion on the conduct of the appellant have agreed that he was negligent as charged. We think the trial court did not err in approving the verdict, and we are not inclined to reverse the judgment as against the weight of the evidence.

of the rope without warning was something that an ordinarily prudent man would not have done under the same or similar circumstances; that is, whether it was or was not negligent. With all the evidence of the surrounding circumstances considered reasonable men might well differ in their conclusion. The court can not err in refusing to direct a verdict. The trial court could not have said the verdict must be for the plaintiff because it reached a contrary conclusion; but it could and should have said that it is considered the verdict manifestly against the weight of the evidence. He did not consider it. The plaintiff's counsel call our attention to several cases concerning the uncontroverted fact that it is our duty to set the verdict aside by reversing the judgment if in our opinion it is contrary to the clear preponderance of the evidence. He would be more inclined to give weight to any impression we have that the weight of the evidence is that of an ordinarily prudent man under similar circumstances but for the verdict of the jury. It is a question more suitable to men usually called as jurors than to men called as judges. When called from the body of the jury they may be presumed to have more familiarity with the facts of the case and their own sense of the evidence better qualified than lawyers to say what ordinary prudent men would do. Apparently the jury found of the verdict where there was some live called to express an opinion on the correctness of the appellant's argument that he was negligent as charged. We think the trial court did not err in granting the verdict, and we are not inclined to reverse the judgment on appeal the weight of the evidence.

It is insisted that appellee was negligent in not letting go of the rope when ordered to do so, and that he was guilty of disobeying the order of his master and therefore cannot recover, and authorities are cited in support of the rule that an employee knowingly and intentionally disobeying reasonable rules or regulations established for his safety cannot recover if his disobedience is the proximate cause of the injury. But it was a question for the jury whether appellee heard the order to let go and whether it was given ~~in~~ at a time when he could have avoided injury had he heard and obeyed. We are not inclined to disturb the finding of the jury that appellee was in the exercise of ordinary care for his own safety.

There were several counts of the declaration, some of them charging facts of which there is no proof; as for instance, that the colt was vicious and that the rope was unfit for use. Appellant argues at length that under the proof no liability arises under either of those allegations, which we think is true; but it cannot be denied that the action of appellant in letting go of the halter and its surrounding circumstances were sufficiently charged in the declaration to admit proof of the facts before indicated. The general issue was plead. In action for torts plaintiff may prove part of his charge if there be enough proof to sustain his charge. (C. & G.T.Ry.Co., v. Spurney, 197 Ill. 471.) If a count avers different sets of facts either of which will justify a recovery, advantage of that defect must be taken by special demurrer. (Chicago City Ry.Co., v. O'Donnell, 207 Ill. 478.)

(Chicago City & Co., 400 North La Salle, 1871-1872.)

every different set of these either of which will justify a recovery, although at that point must be taken by special contract.

The general issue was plain. In action for torts plaintiff may

in the declaration to admit proof of the facts herein indicated.

either and the corresponding circumstances were sufficiently alleged

cannot be denied that the action of plaintiff in taking up of the

under of that of the defendant, which was taken in time; but it

plaintiff agreed at length to enter the record no liability arises

the cost was violated and that the rope was worth for use. 1871-1872.

alleging facts of which there is no proof; as for instance, that

There were several counts of the declaration, none of them

satisfy.

jury that appellee was in the exercise of ordinary care for his own

heard and obeyed. He was not inclined to disturb the finding of the

it was given in at a time when he could have avoided injury and he

for the jury whether appellee heard the order to let go and whether

obedience is the proximate cause of the injury. But it was a question

negligence established for the jury cannot recover in his case.

knowingly or intentionally diminishing the value of the

and attention are cited in support of the rule that an employee

disobeying the order of his master and committing himself to a

one of the rope when ordered to do so, and that he was guilty of

It is insisted that appellee was negligent in not letting

The court is said to have refused five instructions offered by appellant, and this is urged as error. In the brief they are referred to by number, but we find no corresponding number in the abstract or record, and will only discuss those that are definitely pointed out in the brief. In what appellant there calls number ten the court was asked to tell the jury if the letting go of the rope by the defendant was the proximate cause of the injury, still defendant was not liable unless in letting go of the rope he did not exercise that degree of care and caution under all the circumstances that a reasonable and prudent man similarly situated would have exercised; and by instruction number twelve that if the defendant's letting go of the rope was the proximate cause of the injury, still he was not liable unless the evidence showed that in so letting go of the rope the defendant acted in a careless and negligent manner in disregard of the safety of the plaintiff and not in a way that a reasonable and prudent ~~man~~ person similarly situated would have acted. Appellant says the court should have given one of these instructions. By instruction number fourteen the court was asked to tell the jury that if at the time and under the circumstances a reasonable and prudent man in the place of the defendant would have believed there was danger in longer holding onto the rope, then the defendant if he acted on a fear of receiving great bodily injury and released his hold would not be liable for damages to the plaintiff as a result of his letting go of the rope. These refused instructions embodied two propositions: One, that the jury must find not only that the defendant let go of the rope, but that in so doing he was acting negligently. The other that ~~he~~ had the right to let go whatever the consequences if he reasonably believed himself to be in danger. The court did

instruct the jury that before they could find for the plaintiff they must find that the defendant was negligent and that his negligence was the proximate cause of the injury; that the burden ~~of~~ was on the plaintiff to show that the defendant was negligent and he himself was in the exercise of ordinary care; that the questions of due care should be determined by comparing the conduct of the parties with that of reasonably prudent men under the same or similar circumstances; that ~~the~~ plaintiff assumed the risks that were naturally and ordinarily incident to such an attempt to handle a colt, and if he was injured only because of the colt's indulging in the natural propensity to run and break away then he could not recover for any injury sustained solely from seeking to lead the colt; that the plaintiff could not recover for the conduct of the horse if that conduct was such as he might naturally anticipate; that if the injury was the result of an unavoidable accident, and not because of any negligence of the defendant, the plaintiff could not recover. It appears therefore that defendant's instruction numbered ten and twelve announced no principle not already stated in other instructions but only re-stated the definition and effect of negligence as applied particularly to the defendant's letting go of ~~the~~ halter. We do not think it was error to refuse those instructions. We are also of the opinion that instruction number fourteen was properly refused. It in effect said that if the defendant believed himself in great bodily injury he might disregard his duty to the plaintiff and act entirely for his own safety. We know of no principle of law warranting that statement.

Appellant cites and discusses many authorities on the

...of law representing the defendant.
...was not entitled for his recovery. ...
...in great bodily injury he might have suffered his duty to the plaintiff
...returned. It is stated that if the defendant's policy was payable
...also of the opinion that the plaintiff's recovery was properly
...not think it was error to allow him the same. We do
...vicariously to the defendant's liability to the plaintiff. We do
...re-stated the defendant's liability to the plaintiff as applied to
...no principle was shown to be in error in either instance but only
...the defendant's insurance numbered ten and twelve announced
...defendant, the plaintiff could not recover. It is stated therefore
...unavoidable accident, and not because of any negligence of the
...materially anticipated; that if the injury was the result of an
...the content of the horse if that content was such as he might
...ing to lead the colt; that the plaintiff could not recover for
...he could not recover for any injury sustained solely from work
...including in the natural propensity to run and break away from
...handle a colt, and if he was injured only because of the colt's
...were materially and originally intent to produce an injury to
...other circumstances; that the plaintiff assumed the risk that
...parties with that of reasonably prudent men under the same or
...they were unable to be satisfied by ordering the content of the
...himself was in the exercise of ordinary care; that the question of
...on the plaintiff to show that the defendant was negligent and so
...was the proximate cause of the injury; that the burden was
...must find that the defendant was negligent and that the plaintiff
...instruct the jury that before they could find for the plaintiff they

question of the liability of owners of domestic animals not known to be vicious on the liability of the master for defective machinery of which defects the servant had notice, that the master is not an insurer of his servants safety and not bound to provide him absolutely safe appliances or an absolutely safe place, but is only obliged to use reasonable and ordinary care, but we do not see that those principles and authorities control in this case. The colt was in a sense unsafe, and that was known to appellee as well as appellant. It was perhaps dangerous to undertake to lead her into the yard in the manner attempted. Appellee was fully aware of that danger. If the judgment rested on a charge that appellant was negligent in ordering the colt to be taken into the yard in that manner it would be necessary to consider authorities on the question of the liability of the master for damages resulting from obedience to his order in doing an act known by the servant to be dangerous; but the liability is not predicated on that condition. The claim is, as before stated, that appellant and appellee were engaged in a dangerous undertaking requiring each of them to exercise care and prudence, and that appellant failed to do so. We conclude it was within the province of the jury to find that charge sustained by the evidence and that their finding is not clearly and manifestly against the weight of the evidence; that the record discloses no substantial error of law prejudicial to appellant; therefore, that the judgment should be affirmed.

Affirmed.

Niehaus, J., took no part.

question of the liability of owners of premises which is not known to be violative on the liability of the master for defective machinery of which he knows the servant had notice, that the master is not an insurer of his servant's safety and not bound to provide him absolutely safe appliances or an absolutely safe place, but is only obliged to use reasonable and ordinary care, but he does not use that those principles are authorities control in this case. The case was in a recent master, and was known to appellee as well as appellant. It was a dangerous condition to undertake to lead her into the yard in the manner attempted. Appellee was fully aware of that danger. If the judgment rested on a charge that appellee was negligent in ordering the cart to be taken into the yard in that manner, it would be necessary to consider authorities on the question of the liability of the master for damages resulting from injuries to his estate in doing an act known by the servant to be dangerous; but the liability is not predicated on that condition. The state is, as before stated, that appellee and appellee were engaged in a dangerous undertaking requiring each of them to exercise care and judgment, and that appellee failed to do so. We deem it is within the province of the jury to find that charge sustained by the evidence and that in finding it not guilty was manifestly against the weight of the evidence; that the ground disclosed no substantial error of law prejudicial to appellee; therefore, that the judgment should be affirmed.

affirmed.

Rehearsal, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

STATE OF ILLINOIS, { ss. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this twentieth day
of October, in the year of our Lord, one thousand nine hun-
dred and fifteen.

Clerk of the Appellate Court.

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211 I.A. 645

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. ✓ DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Mabel Eads,

-vs- Appellant, appeal from Peoria.

William Moran,

Appellee.

Carnes, J.

Mabel Eads, the appellant, a milliner forty years old earning \$27.50 a week, was struck on a public street in Peoria by an automobile driven by an employee of William Moran, the appellee, and severely injured so that she was confined in a hospital for several weeks and unable to work for about thirty weeks. She brought this action on the case, and her evidence showed without much contradiction that her actual damages including loss of earnings was \$1604.70, without including anything for pain and suffering, or permanent injury. She had a verdict for \$1000. Each party moved for a new trial, but appellee did not press his motion. The court overruled each motion and entered judgment on the verdict, from which the plaintiff appeals and asks a reversal urging that the verdict was inadequate and that the court erred in modifying one of her instructions. Appellee assigns no cross-error but argues that it was within the province of the jury to determine the amount of damages; that they were warranted in assuming that some of the items were unnecessary or exaggerated, and that appellee's driver was not negligent and appellee was, and therefore she should be held not entitled to any damages.

Exhibit No. 17.

Exhibit No. 17.

Exhibit No. 17.

Exhibit No. 17.

Exhibit No. 17.

Exhibit No. 17.

Exhibit No. 17. The applicant, a plaintiff forty years old, residing at 127.50 a week, was struck on a public street in Providence by an automobile driven by an employee of William Brown, the defendant, and severely injured so that she was confined in a hospital for several weeks and unable to work for about thirty weeks. She brought this action on the case, and her evidence showed without much contradiction that her actual damages including loss of earnings was \$100.70, without including anything for pain and suffering, or permanent injury. She had a verdict for \$100.70, but was set aside for a new trial, and appealed this not to pass in motion. The court reversed such action and entered judgment on the verdict, from which the plaintiff appealed and asks a reversal urging that the verdict was inadequate and that the court erred in modifying one of her instructions. The plaintiff assigns no error and asks that it be within the province of the jury to determine the amount of damages; that they were warranted in assuming that some of the items were unnecessarily or exaggerated, and that applicant's driver was not negligent and applicant was, and therefore she should be held not entitled to any damages.

It is the duty of this court to reverse a judgment where the damages awarded are clearly inadequate. Courts hesitate to disturb verdicts on that ground where there is no legal standard for computing damages as in cases of slander and libel, or injury to the person where damages must be based on pain and suffering or permanent disability, or where exemplary damages are warranted and awarded. But even in the latter class of cases verdicts are set aside because of inadequacy of the damages awarded if at first blush it is plain that the verdict is much less than it should have been. (47 L.R.A.33; L.R.A.1915F 491; Paul v. Leyenberger, 17 Ill. App. 167; Kilmer v. Parrish, 144 Ill. App. 270; Orr v. Wahlfeld Mfg. Co., 179 Ill. App. 235; DeFreitas v. Nunes, 130 Ill. App. 195) In the present case there can be no question that appellant suffered more than \$1000. damages subject to legal, accurate computation which she was entitled to recover, with a further substantial sum for other injuries resting/^{more} largely in the opinion and discretion of the jury if the issue of negligence was found in her favor.

The jury found that issue for the plaintiff; therefore, their verdict is inconsistent. Notwithstanding no cross-error is assigned, we would consider whether we ought to reverse the judgment and remand the cause for another trial if we were of the opinion that the verdict on the question of negligence was so clearly against the weight of the evidence as to call for a reversal on that ground had cross-errors been assigned; but we are satisfied that the trial court would not have been warranted in directing a verdict for the defendant, and that we would not be warranted if cross-errors were filed in reversing the judgment without remanding the case; therefore, the judgment

should be reversed and the cause remanded.

The only other error suggested is that the court modified an instruction as to the measure of damages offered by appellant. It is argued that elements of damage concededly proper to be considered were omitted in the modified instruction so given. Appellee answers that the instruction properly understood is not open to that objection, and that it is no more subject to that criticism since its modification than it was before. The instruction seems to us ~~open~~ to appellant's objection. The judgment is reversed and the cause remanded.

Reversed and Remanded.

Niehaus, J. took no part.

should be reversed and the same returned.

The only other error suggested is that the court erred in its instruction as to the measure of damages claimed by Plaintiff. It is argued that amounts of damage concededly proper to be considered were omitted in the modified instruction so given. Appellate answers that the instruction properly understood is not open to that objection, and that it is no more subject to that criticism than its modification than it was before. The instruction seems to us to be open to appellants' objection. The judgment is reversed and the same remanded.

Reversed and Remanded.

Michael, J. diss. as to part.

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6480

4315

211 I.A. 646

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

8161 52 700

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1111 1111

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
 LIBRARY
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George F. Patterson, as administrator
of the Estate of William Harry Penry,
Deceased,

Defendant in error,

-vs-

William J. Jackson, as Receiver of
Chicago & Eastern Illinois Railroad
Company,

Plaintiff in error.

Writ of error to
Circuit Court
Iroquois County.

Nichols, J.

This is a suit brought by George F. Patterson as administrator of the Estate of William Harry Penry, deceased, for the benefit of the widow and next of kin of the deceased against the plaintiff in error, William J. Jackson, as Receiver of the Chicago & Eastern Railroad Company, to recover damages alleged to have been sustained by said widow and next of kin because of the death of Penry who is alleged to have been killed by the negligence of the plaintiff in error's servants in the operation of a railroad train through the village of Milford in Iroquois county. The Chicago & Eastern Illinois Railroad runs through the village of Milford in a north and south direction, and crosses Jones Street, the main street of the village, practically at right angles. There are two main tracks, the south bound trains use the westerly track and the north bound trains use the easterly track; there is also a sidetrack at the crossing located east of the north bound track. On September 18, 1915, about eight p. m. Penry was coming from his home apparently going to the business part of the village on the northerly side of Jones Street, and was in the act of crossing the south bound or westerly railroad track when he was struck by a train consisting of a locomotive and a caboose running south through the village. The

George F. Patterson, as receiver of the estate of William Henry Perry, deceased.

Defendant in error.

-vs-

William J. Jackson, as receiver of Chicago & Eastern Illinois Railroad Company.

Plaintiff in error.

Writ of error to Circuit Court Illinois County.

Verdict.

This is a writ brought by George F. Patterson as administrator of the estate of William Henry Perry, deceased, for the benefit of the widow and next of kin of the deceased against the plaintiff in error, William J. Jackson, as receiver of the Chicago & Eastern Illinois Company, to recover damages alleged to have been sustained by said widow and next of kin because of the death of Perry and is alleged to have been killed by the negligence of the plaintiff in error's servants in the operation of a railroad train through the village of Alford in Proprietary County. The Chicago & Eastern Illinois Railroad runs through the village of Alford in a north and south direction, and crosses Jones Street, the main street of the village, practically at right angles. There are two main tracks, the north bound train on the westerly track and the north bound train on the easterly track; there is also a side track at the crossing located east of the north bound track. On September 18, 1917, about eight P. M. Perry was passing from his home apparently going to the business part of the village on the easterly track of Jones Street, and was at the point of crossing the north bound westerly railroad track when he was struck by a train consisting of a locomotive and a caboose moving north through the village. The

train was an extra, and was running at a speed which was variously estimated by witnesses at from 20 to 50 miles per hour. There are several charges of negligence made in the declaration, including the running of the train at an exceedingly high rate of speed; a violation of the provisions of the village ordinance by exceeding the speed limit fixed thereby; also the failure of plaintiff in error's servants to operate or ring the signal or alarm bell, which was maintained at the crossing by the plaintiff in error for the purpose of warning persons of the approach of trains. The general issue was filed to the declaration, and the case proceeded to trial, which resulted in a verdict and judgment for defendant in error in the sum of \$4500.00; and this writ of error is prosecuted from the judgment.

The principal errors assigned are the refusal of the court to direct a verdict for the defendant because it is claimed that the evidence conclusively shows that the deceased was guilty of contributory negligence and that therefore legally there was no right to recover; also, that the court erred in admitting the ordinance of the village of Milford regulating the speed of trains running through the village; and in admitting in evidence the entire verdict of the coroner's jury. The contention of the plaintiff in error with reference to the lack of proof of the publication of the ordinance of the village of Milford referred to we do not regard as well taken. Section 4 of article 5 of the act providing for the incorporation of cities and villages provides, that "all ordinances, and the date of publication thereof, may be proven by the certificate of the clerk under the seal of the corpora-

train was an extra, and was running at a speed which was variously estimated by witnesses at from 20 to 30 miles per hour. There are several charges of negligence made in the declaration, including the running of the train at an exceedingly high rate of speed; a violation of the provisions of the village ordinance by exceeding the speed limit fixed thereby; also the failure of plaintiff in error's servants to connect or ring the signal or alarm bell, which was maintained as the crossing by the plaintiff in error for the purpose of warning persons of the approach of trains. The general issue was filed to the declaration, and the case proceeded to trial, which resulted in a verdict and judgment for defendant in error in the sum of \$4000.00; and this writ of error is presented from the judgment.

The principal errors assigned are the refusal of the court to direct a verdict for the defendant because it is claimed that the evidence conclusively shows that the deceased was guilty of contributory negligence and that therefore liability thereon was no right to recover; also, that the court erred in admitting the evidence of the village of Milford regarding the speed of trains running through the village; and in admitting in evidence the entire verdict of the coroner's jury. The contention of the plaintiff in error with reference to the lack of proof of the violation of the ordinance of the village of Milford related to the fact that it is not required by Section 6 of article 2 of the constitution that all ordinances, and the date of publication thereof, may be proven by the certificate of the clerk under the seal of the town.

"tion. And when printed in book or pamphlet form, and purporting to be published by authority of the Board of Trustees or the City Council, the same need not be otherwise published; and such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances as of the dates mentioned in such book or pamphlet, in all courts and places without further proof." The ordinance in question was offered and put in evidence, printed in a book containing the revised ordinances of the village of Milford, and purporting to be published by authority of the Board of Trustees of the village; and it appeared from the certificate of the village clerk, under the corporate seal of the village, that the ordinance was published in this way on the date of July 12th, 1915. This was a sufficient compliance with the requirements of the statute and of the proof of the publication of the ordinance. *Standard v. Village of Industry*, 55 Ill. App. 525. The verdict of the coroner's jury, which was admitted in evidence, contained in addition to the finding that William Harry Penry came to his death by being struck by engine #846 Extra, going south on the C. & E. I. R.R. tracks in the village of Milford, the following:- "From the evidence taken we find that the signal service is out of repair; and that the speed of train is in excess to the safety of life and limb, and does not conform to the ordinance of the village of Milford." We are of opinion that that part of the coroner's verdict which is above quoted should not have been admitted in evidence. The finding that the signal service was out of repair, and that the city ordinance was violated by the speed of the train was not of serious import in this case because these matters were established by other evidence; and we are not holding that it would not have been competent for the coroner's jury to have made a finding of the rate of

tion, and when printed in book or pamphlet form, and purporting
to be published by authority of the Board of Trustees of the City
Council, the same shall be received as evidence of the contents and legal
application of such ordinance as of the date contained in such
book or pamphlet, in all courts and places and in all further process.
No ordinance in question was offered and put in evidence, printed
in a book containing the revised ordinances of the village of
Albion, and purporting to be published by authority of the Board of
Trustees of the village; and it appeared from the certificate of the
Albion clerk, under the corporate seal of the village, that the
ordinances so published in this way on the date of July 18th, 1890.
This was a sufficient compliance with the requirements of the statute
and of the proof of the publication of the ordinance. Standard v.
Village of Albion, 25 Ill. App. 525. The verdict of the court in
favor of the plaintiff, which was admitted in evidence, contained in addition to the
finding that William Barry's copy was so in fact by being struck
by engine 846 later, going south on the U. S. & N. R. track in
the village of Albion, the following:- "from the evidence taken
the jury find that the signal service is out of repair; and that the
road of train is in excess to the safety of life and limb, and
that the defendant is liable for the damages of the village of Albion."
It is of opinion that that part of the court's verdict which is
above quoted should not have been admitted in evidence. The
finding that the signal service was out of repair, and that the city
was liable for the damages of the village of Albion, was not of course
in the case because these matters were established by other
evidence; and we are not holding that it would not have been con-
sidered for the court's duty to have made a finding on the facts of

speed per hour at which the train was running as one of the material circumstances relating to and connected with the death of Penry. But the finding that the speed of the train was in excess of what was required for the safety of life and limb by the coronor's verdict directly fixed upon the plaintiff in error a civil liability by determining that plaintiff in error's servants were guilty of a grave violation of duty. "It is not within the province of a Coronor's jury to fix the civil liability of any one growing out of an accident resulting in the death of an injured person." Novitsky, Admr. v. Knickerbocker Ice Co., 276 Ill. 102; Morris & Co., v Industrial Board, 284 Ill. 67. Where a person is killed accidentally, as in this case, by being run over or struck by a railroad train the legitimate object of the coronor's inquest is fulfilled in the finding that the death of the deceased was caused by being run over or struck by a railroad train, "without inquiry whether it was through any one's, or whose negligence." Peoria Corgage Co. v Industrial Board, 284 Ill. 90. It is a reasonable inference that the introduction of the part of the coronor's verdict referred to had a prejudicial effect upon the minds of the jury in passing upon the question of the plaintiff in error's liability, and therefore was reversible error. The question of contributory negligence raised in this case was one for the jury to determine as a question of fact, and the court therefore properly refused to direct a verdict. For the error indicated, however, judgment is reversed and cause remanded for another trial.

Judgment reversed and cause remanded.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6539

4316
211 I.A. 647

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6539.

The People of the State of Illinois.

Defendant in error.

vs Error to Co. Ct. McHenry.

Ben Silver, Plaintiff in error.

Niehaus, J.

The plaintiff in error, Ben Silver, was tried in the county court of McHenry County, upon an information filed against him, containing twenty counts, for selling intoxicating liquor in anti saloon territory; and the jury returned a verdict finding him guilty on five counts of the information. A motion for a new trial was thereupon made by the Plaintiff in error based principally upon certain matters alleged as newly discovered evidence in affidavits which he filed in connection therewith; but the motion was denied; also a motion in arrest of judgment. Judgment was rendered on the verdict of the jury; and the court sentenced the plaintiff in error to confinement in the county jail for a period of thirty days on each of the 16th. 17th. 18th. 19th. and 20th. counts of the information, (which were the counts referred to in the verdict of guilty) and making an aggregate time of imprisonment of 150 days. It was also adjudged by the court, that the defendant pay a fine of \$100 on each of said counts. From the judgment and sentence mentioned, plaintiff prosecutes this writ of error. The principal ground urged for a reversal of the judgment is the refusal of the court to grant a new trial because of the matters set up in the affidavits; and it is also contended that the court erred in the giving of some of the instructions for the people. It is alleged in the affidavits that Sam Kaplan, who was a witness against the plaintiff in error, made repeated efforts to procure testimony against

The People of the State of Illinois.

Defendant in error.

vs
Error to Co. Ct. Henry.

Ben Silver, Plaintiff in error.

Michael, J.

The plaintiff in error, Ben Silver, was tried in the county court of Henry County, upon an information filed against him, containing twenty counts, for selling intoxicating liquor in said saloon territory; and the jury returned a verdict finding him guilty on five counts of the information. A motion for a new trial was thereupon made by the plaintiff in error based principally upon certain matters alleged as newly discovered evidence in affidavits which he filed in connection therewith; but the motion was denied; also a motion in arrest of judgment. Judgment was rendered on the verdict of the jury; and the court sentenced the plaintiff in error to confinement in the county jail for a period of thirty days on each of the 15th, 17th, 18th, 19th, and 20th counts of the information, (which were the counts referred to in the verdict of guilty) and adding an aggregate time of imprisonment of 150 days. It was also adjudged by the court, that the defendant pay a fine of \$100 on each of said counts. From the judgment and sentence mentioned, plaintiff prosecutes this writ of error. The principal ground urged for reversal of the judgment is the refusal of the court to grant a new trial because of the matters set up in the affidavits; and it is also contended that the court erred in the giving of some of the instructions for the jury. It is alleged in the affidavits that Ben Silver, who was a witness against the plaintiff in error, made repeated efforts to procure testimony against

the plaintiff in error; and one Isaac Levison states in an affidavit, that he was approached by Kaplan in the city of Chicago, and solicited by Kaplan to testify that he had bought Liquor from the plaintiff in error, whereupon he replied to Kaplan, that he could not so testify, because he had never bought liquor of him; he also states that Kaplan told him, that the plaintiff in error had given him a beating; and that he wanted to get even with him. Another of the affidavits filed is by Max Dunn, who states, that he was present in the city of Chicago when the conversation between Kaplan and Levison took place, and corroborates Levison as to what was said between them.

Another affidavit with reference to the same matter is by John J. Panosh, who swears that Kaplan approached him on the street at Harvard, and wanted him to testify against the plaintiff in error; and asked him, if he would not testify that Silver gave him drinks of liquor while he was working for him; but that he Panosh refused to do so, and told him that he did not get any drinks from Silver while he was working there. In as much as none of the parties making affidavits testified in the case it is clear, that the purpose of the affidavits is to show that Kaplan had a feeling of resentment, ill will or malice against the plaintiff in error; and contained matters that would tend to impeach Kaplan's credibility. The general rule is, that a new trial will not be granted to afford an opportunity of impeaching a witness. Cochran vs Armon 16 Ill. 315; Fletcher v People 117 Ill. 184. There are exceptions to the general rule; but in this case the evidence outside of Kaplan's testimony was clearly sufficient to sustain the conviction; and it is apparent therefore that the rule applies and not the exceptions. The other affidavits filed, contain statements of several parties to the effect that Mrs. Agnes Schappel (who was a witness against plaintiff in error, concerning

the plaintiff in error; and one Isaac Davidson states in an affidavit, that he was approached by Kaplan in the city of Chicago, and solicited by Kaplan to testify that he had bought liquor from the plaintiff in error, whereupon he replied to Kaplan, that he could not so testify, because he had never bought liquor of him; he also states that Kaplan told him, that the plaintiff in error had given him a beating; and that he wanted to get even with him. Another of the affidavits filed is by Max Dunn, who states, that he was present in the city of Chicago when the conversation between Kaplan and Davidson took place, and corroborates Davidson as to what was said between them.

Another affidavit with reference to the same matter is by John J. Parnosh, who swears that Kaplan approached him on the street at Harvey, and wanted him to testify against the plaintiff in error; and asked him, if he would not testify that Eliver gave him drinks of liquor while he was working for him; but that he Parnosh refused to do so, and told him that he did not eat or drink from Eliver while he was working there. In as much as none of the parties making affidavits testified in the case it is clear, that the purpose of the affidavits is to show that Kaplan had a feeling of resentment, ill will or malice against the plaintiff in error; and contained matters that would tend to impeach Kaplan's credibility. The point of rule is, that a new trial will not be granted to afford an opportunity of impeaching witnesses. *Cochran vs. Atcham* 18 Ill. 323; *Wether v. People* 117 Ill. 134. There are exceptions to the general rule; but in this case the evidence of Kaplan's testimony was clearly sufficient to sustain the conviction; and it is apparent therefore that the rule applies and not the exceptions. The other affidavits filed, contain statements of several parties to the effect that Mrs. Agnes Schepel (who was a witness against the plaintiff in error, concerning

the sale of liquor to her husband Stanley Schappel) had admitted at different times that she was not really married to Stanley Schappel; and that he was not her husband. The question as to whether the Schappels were legally married could not properly be adjudicated in this kind of a case; and the evidence would not be competent even to affect the credibility of the witness. The motion for a new trial was therefore properly overruled.

There is apparently some ground for criticism concerning the number and volume of the instructions given for the people on the nature and limitations of a reasonable doubt; but we find no erroneous definitions, or statements in the instructions, which could have misled the jury; but apparently the instructions on both sides exceeded the requirements of the occasion and the cause in extent and volume; but taking them all together, the law, applicable to the case is stated with substantial correctness there is no reversible error in this feature of the case.

The court erred however in fixing the term of the imprisonment of the plaintiff in error in gross. The rule established by the supreme court, where a defendant is sentenced upon different counts, is to fix a specified time under each count; and also state in the sentence that the time under one shall begin at the expiration of the time under the previous one. *People v Elliott* 272 Ill. 592. For the purpose of correcting this error in the sentence and judgment the case must be reversed; and it is remanded with directions to the county court to enter a proper judgment and sentence in accordance with rule referred to.

Reversed and remanded with directions.

the case of *Idipor* to her husband *Erniey* (Idipor) not admitted
at different times that he was not *Idipor* married to *Erniey*
Sophy; and that he was not her husband. The question as to
whether the *Sophy* were legally married would not properly
be adjudicated in this kind of a case; and the witness would not
be competent even to affect the credibility of the witness.
The motion for a new trial was therefore properly overruled.
There is an equally strong ground for criticism con-
cerning the number and volume of the instructions given for the
people on the nature and limitations of a reasonable doubt; but
we find no error in the instructions, or statements in the instructions
which could have misled the jury; but apparently the instructions
on both sides exceeded the requirements of the occasion and the
cause in extent and volume; but taking them all together, the
law applicable to the case is stated with substantial correctness
there is no reversible error in this feature of the case.
The court erred however in fixing the term of the imprisonment
of the plaintiff in error in years. The rule established by the
supreme court, *People v. ...* is not needed upon this point
counts, is to fix a specified time under each count; and also
state in the sentence that the time under each shall begin at the
expiration of the time under the previous one. *People v. ...*
375 Ill. 583. For the purpose of correcting this error in the
sentences and judgment the case must be reversed; and it is reversed
with directions to the county court to enter a proper judgment
and sentence in accordance with this reversal.
Reversed and remanded with directions.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6543

4317

211 I.A. 649

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

21171118

RECEIVED

TO THE DIRECTOR OF THE BUREAU OF THE ARMY
FROM THE SECRETARY OF THE ARMY
SUBJECT: [illegible]

1. [illegible]

2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

6. [illegible]

7. [illegible] 21171118

8. [illegible]

9. [illegible]

Gen. No. 6543

William Sorenson, appellee

vs

Appeal from Stark.

Lee Cox, appellant.

Niehaus, J.

In this case William Sorenson, the appellee, sued Lee Cox the appellant for the value of a mare owned by him, which was bred to appellant's stallion claiming that in such breeding the mare was injured because the stallion made an improper connection and an entry into the rectum of the mare; and that from the injuries thereby received the mare died. The case was tried on appeal from a Justice of the Peace, in the Circuit Court of Stark County; and the appellee obtained a verdict and judgment for \$160. and this appeal is prosecuted from the judgment. The only question raised on appeal, to reverse the judgment, is one of fact, as to whether or not the groom, who was handling the stallion for the appellant for breeding purposes, was guilty of negligence in not giving proper assistance to the stallion. The evidence tends to show that it is often necessary to assist the stallion in breeding to a mare, to make the proper entry and connection, and to give this assistance is the function of the groom. In this case the proof shows, that when the stallion mounted the mare the groom was six or eight feet away from ~~the~~ the place where copulation was to take place, and not in position to give any assistance to the stallion; nor to prevent an improper entry. This appears to some extent from his own testimony. His testimony on this point is as follows: "I was not satisfied that he (the stallion) entered wrong at the time. Later I learned it from what I could see." We think the jury were fully warranted in the conclusion reached from the evidence that the groom was negligent, in the performance of his duties as groom; and that the injury to the mare

William Robertson, Appellee

vs

James Cox, Appellant.

1904, 3.

In this case William Robertson, the appellee, sued James Cox the appellant for the value of a mare owned by him, which was bred to appellant's stallion claiming that in such breeding the mare was injured because the stallion held an improper connection and entry into the rectum of the mare; and that from the injuries thereby received the mare died. The case was tried on appeal from the Justice of the Peace, in the Circuit Court of Stark County; and the appellee obtained a verdict and judgment for \$100. and his appeal is now brought from the judgment. The only question raised on appeal, to reverse the judgment, is one of fact, as to whether or not the groom, who was handling the stallion for the appellant for breeding purposes, was guilty of negligence in not giving proper assistance to the stallion. The evidence tends to show that it is often necessary to assist the stallion in breeding a mare, to take the proper entry and connection, and to give his assistance in the function of the rectum. In this case the record shows, that when the stallion mounted a mare the groom was six or eight feet away from his place where, according to the law and place, and not in position to give any assistance to the stallion; nor to exert an influence on him. This tends to show that from his own testimony. His testimony on this point is as follows: "I was not satisfied that he (the stallion) entered the mare at the time. Later I learned it from what I could see." I think the jury were fully warranted in the conclusion reached from the evidence that the groom was negligent, in the manner

from such negligence. This was a question for the jury, and this court would not be justified in disturbing their verdict unless the verdict was manifestly against the weight of evidence.

The judgment is therefore affirmed.

Judgment affirmed.

For such negligence. This was a question for the jury, and this
we would not be justified in disturbing their verdict unless
the verdict was manifestly against the weight of evidence.

The judgment is therefore affirmed.

Judge of the Court.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6565

4319

AT A TERM OF THE APPELLATE COURT,

211 I.A. 653

begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the Clerk's office of said Court, in the words and figures
following, to-wit:

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Ben. No. 6565 .

F. J. Nelson, for the use of
The Galva Heater Co. appellant.

vs

County Ct.
Appeal from Knox.

C. E. Quaife, appellee

Nichaus, J.

In this case the appellant F. J. Nelson for the use of the Galva Heater Co. sued the appellee C. E. Quaife in the County Court of Knox County to recover the contract price, of a hot water heating apparatus, which he furnished and set up in appellee's residence at Galesburg. The declaration consists of a special count on the contract; and the common counts; to which was attached an affidavit, claiming \$640.33, as the amount due the appellant. The appellee filed the general issue, and a notice of matters of set off or recoupment with an affidavit of merits. The affidavit of merit sets up a breach of warranty as a defense, and damages resulting therefrom, as an offset to the appellant's demand, except \$350. There was a trial by jury concerning the additional amount claimed by the appellant, which resulted in a verdict for the appellee; whereupon the appellant made a motion for a new trial which was denied, and the court rendered judgment for the \$350 admitted to be due, by the pleadings. An appeal is prosecuted from this judgment.

It is argued as a ground for the reversal of the judgment that the court should have granted a new trial, because the verdict of the jury was manifestly against the weight of the evidence; and complaint is also made concerning the modification and refusal of instructions. The proof shows, that the appellee entered into a written contract with the appellant, by which the appellant was to furnish to appellee, a first class hot water

J. T. Nelson, for the use of

the Olive Harter Co. appellant.

A small town near

va

J. E. Christie, appellee

Attorney, J.

In this case the appellant J. E. Nelson for the use of the Olive Harter Co. sued the appellee J. E. Christie in the county Court of Knox County to recover the contract price, of a water lifting apparatus, which he furnished and set up in appellee's residence at Glasgow. The declaration consists of a special count on the contract; and the second count, which was attached as a bill of particulars, set out the facts on the contract. The appellee filed the general issue, and a motion to set off or recoupment with an affidavit of set off. The affidavit of set off sets up a breach of warranty on the part of the appellee, and damages resulting therefrom, as an offset to the contract price. There was a trial by jury on the contract, and the jury returned a verdict for the appellee, awarding him the contract price, with interest, and costs. The appellant moved for a new trial, which was denied, and the court rendered a judgment for the appellee, awarding him the contract price, with interest, and costs. The appellant moved for a new trial, which was denied, and the court rendered a judgment for the appellee, awarding him the contract price, with interest, and costs. The appellant moved for a new trial, which was denied, and the court rendered a judgment for the appellee, awarding him the contract price, with interest, and costs.

It is argued on a motion for the reversal of the judgment that the court should have granted a new trial, because the verdict of the jury was manifestly against the weight of the evidence; and because it is well known that the appellee had no right to the contract price, but that the contract was made with the appellant, and that the water lifting apparatus was so furnished to the appellee, that it was not water

heating apparatus, which was to be a No. 57 Galva Hot Water Heater; to be completed, and set up in the basement of appellee's residence, for the sum of \$595; and as a part of this contract appellant guaranteed that "all material and workmanship used in the construction of this apparatus to be the best of their respective kinds, and the apparatus as a whole to be capable of heating all rooms in which radiators are placed, to the temperature specified in the table, in the coldest weather." The temperature specified in the table was 70° in the rooms on the first floor, which included the living room, dining room, hall and vestibule; and 60° in the rooms on the second floor, which were the sleeping rooms. The appellant installed the heating apparatus, but instead of putting in a No. 57 heater, he put in a No. 58 heater, which was 7½ inches higher than the No. 57. The proof is clearly to the effect that the heating apparatus after it had been installed and put into operation, failed to heat appellee's house as required by the warranty; and a breach of the warranty was thereby established. It is claimed by the appellee that the furnace failed to heat properly because the ~~extra~~ heater was higher, and therefore the water pipes leading from the furnace did not have the necessary slant or rise; and that this prevented the hot water from properly circulating through the pipes; that the greater height in the furnace put in, also interfered with the draft, and consequently the furnace smoked. Appellee also claimed, that the furnace was carelessly put together, and that there were defects in its construction which showed a lack of good workmanship: And the evidence tends to support appellee's contention. But appellant insists, the appellee consented to the change of the No. 57 heater to the No. 58; and therefore, must abide by the consequences. Appellee however testified, that he was not aware of the change of the size of the furnace until after it had been installed, and

...ing system, which was to be a No. 35 Oliver Hot Water Heater;
to be completed, and set up in the basement of applicant's resi-
dence, for the sum of \$250; and as a part of this contract appli-
cant warranted that "all material and workmanship used in the
construction of this apparatus to be the best of their respective
trade, and the apparatus as a whole to be capable of heating all
rooms in which radiators are placed, to the temperatures specified
in the table, in the coldest weather." The temperatures specified
in the table was 70° in the rooms on the first floor, which in-
cluded the living room, dining room, hall and vestibule; and 60°
in the rooms on the second floor, which were the sleeping rooms.
As applicant installed the heating apparatus, but instead of put-
ting in a No. 35 heater, as put in a No. 25 heater, which was
5 inches higher than the No. 35. The proof is clearly to the
effect that the heating apparatus, after it had been installed
and put into operation, failed to heat applicant's house as required
by the warranty; and a breach of the warranty was thereby estab-
lished. It is claimed by the defendant that the furnace failed to
heat properly because the water heater was high, and therefore
the water pipes leading from the furnace did not have the necessary
fall or slope; and that this prevented the hot water from properly
circulating through the pipes; and the greater amount of the
hot water put in, and circulated with the water, the more
the furnace worked. Applicant also claimed, that the water was
circulated out of the furnace, and that there was leakage in the con-
nection which caused a loss of heat energy; and the evi-
dence tends to support applicant's contention. The evidence
shows, the furnace operated as the owner of the No. 25 heater
to the No. 35; and therefore, that while the furnace was
applied however installed, that it was not what the warranty

the jury were warranted in believing his testimony on that point; but even if he made no objection to the change, it would necessarily relieve the appellant from the obligation of his warranty. On the question of the damages resulting to the appellee because of the breach of the warranty, there is evidence in the case from which the jury might properly concluded that the heating apparatus was practically without value for the heating purpose for which it was installed; but that if removed, it had a value of about \$300. It is a reasonable inference from this evidence that appellee was damaged to an amount which exceeded what was claimed in his affidavit of merits; we conclude therefore, that the verdict of the jury was supported by the evidence.

The errors assigned by appellant concerning the refusal and modifications of instructions are not properly before us for consideration because the appellant has not set out all the instructions; and the record does not even show, at whose instance the different instructions were given or refused. It is a well settled rule, that where only the instructions complained of, are set out in the abstract, the court will not consider errors assigned concerning them, because it must be presumed, that the errors if there are any, are covered in the other instructions, which were not set out. *The city of Danville v Schultz* 99 Ill. App. 283; *Terre Haute & I. R. Co. v Williams*, 69 Ill. App. 392; *Hellmuth v Katschke*, 35 Ill. App. 21; *McGillis v Gaile*, 33 Ill. App 316; *St. Louis A. & T. R. Co. v Barrett* 53 Ill. App. 510; *Belleville Pump Works v Bender* 69 Ill. App. 189; *Pratt & Co. v Paris Gaslight & Coke Co.* 155 Ill. 531; *City of Woodhouse v Christian* 158 Ill. 137; *Thompson v People* 193 Ill. 79; *People v Weil*, 243 Ill. 314.

The modifications of instructions complained of however made no substantial change in the instructions, and apparently could not have had any effect upon the conclusions reached by the

the jury was warranted in believing his testimony or not; but even if we made no objection to the charge, it would necessarily relieve the appellant from the obligation of his testimony. On the question of the charges relating to the evidence of the witness, there is evidence in the case from which the jury might properly conclude that the testimony was practically without value for the hearing purposes for which it was introduced; but that it is not a matter of fact. It is a reasonable inference from the evidence that the witness was misled to an extent which excluded what was stated in his affidavit of belief; we conclude therefore, that the error of the jury was supported by the evidence.

The error assigned by appellant is not supported by the evidence and the instructions of the court are not properly set aside on this consideration because the appellant has not set out all the instructions; and the record does not even show, at least in substance, the different instructions given or refused. It is a well settled rule, that where only the instructions complained of are set out in the record, the court will not consider them as assigned concerning them, because it must be presumed, that the entire instructions were given, and there is no other instruction, which were not set out. The case of *Davidson v. Davidson*, 22 Ill. App. 225; *Trotter v. State*, 11 Ill. App. 225; *1887*; *1888*; *1889*; *1890*; *1891*; *1892*; *1893*; *1894*; *1895*; *1896*; *1897*; *1898*; *1899*; *1900*; *1901*; *1902*; *1903*; *1904*; *1905*; *1906*; *1907*; *1908*; *1909*; *1910*; *1911*; *1912*; *1913*; *1914*; *1915*; *1916*; *1917*; *1918*; *1919*; *1920*; *1921*; *1922*; *1923*; *1924*; *1925*; *1926*; *1927*; *1928*; *1929*; *1930*; *1931*; *1932*; *1933*; *1934*; *1935*; *1936*; *1937*; *1938*; *1939*; *1940*; *1941*; *1942*; *1943*; *1944*; *1945*; *1946*; *1947*; *1948*; *1949*; *1950*; *1951*; *1952*; *1953*; *1954*; *1955*; *1956*; *1957*; *1958*; *1959*; *1960*; *1961*; *1962*; *1963*; *1964*; *1965*; *1966*; *1967*; *1968*; *1969*; *1970*; *1971*; *1972*; *1973*; *1974*; *1975*; *1976*; *1977*; *1978*; *1979*; *1980*; *1981*; *1982*; *1983*; *1984*; *1985*; *1986*; *1987*; *1988*; *1989*; *1990*; *1991*; *1992*; *1993*; *1994*; *1995*; *1996*; *1997*; *1998*; *1999*; *2000*; *2001*; *2002*; *2003*; *2004*; *2005*; *2006*; *2007*; *2008*; *2009*; *2010*; *2011*; *2012*; *2013*; *2014*; *2015*; *2016*; *2017*; *2018*; *2019*; *2020*; *2021*; *2022*; *2023*; *2024*; *2025*; *2026*; *2027*; *2028*; *2029*; *2030*; *2031*; *2032*; *2033*; *2034*; *2035*; *2036*; *2037*; *2038*; *2039*; *2040*; *2041*; *2042*; *2043*; *2044*; *2045*; *2046*; *2047*; *2048*; *2049*; *2050*; *2051*; *2052*; *2053*; *2054*; *2055*; *2056*; *2057*; *2058*; *2059*; *2060*; *2061*; *2062*; *2063*; *2064*; *2065*; *2066*; *2067*; *2068*; *2069*; *2070*; *2071*; *2072*; *2073*; *2074*; *2075*; *2076*; *2077*; *2078*; *2079*; *2080*; *2081*; *2082*; *2083*; *2084*; *2085*; *2086*; *2087*; *2088*; *2089*; *2090*; *2091*; *2092*; *2093*; *2094*; *2095*; *2096*; *2097*; *2098*; *2099*; *2100*; *2101*; *2102*; *2103*; *2104*; *2105*; *2106*; *2107*; *2108*; *2109*; *2110*; *2111*; *2112*; *2113*; *2114*; *2115*; *2116*; *2117*; *2118*; *2119*; *2120*; *2121*; *2122*; *2123*; *2124*; *2125*; *2126*; *2127*; *2128*; *2129*; *2130*; *2131*; *2132*; *2133*; *2134*; *2135*; *2136*; *2137*; *2138*; *2139*; *2140*; *2141*; *2142*; *2143*; *2144*; *2145*; *2146*; *2147*; *2148*; *2149*; *2150*; *2151*; *2152*; *2153*; *2154*; *2155*; *2156*; *2157*; *2158*; *2159*; *2160*; *2161*; *2162*; *2163*; *2164*; *2165*; *2166*; *2167*; *2168*; *2169*; *2170*; *2171*; *2172*; *2173*; *2174*; *2175*; *2176*; *2177*; *2178*; *2179*; *2180*; *2181*; *2182*; *2183*; *2184*; *2185*; *2186*; *2187*; *2188*; *2189*; *2190*; *2191*; *2192*; *2193*; *2194*; *2195*; *2196*; *2197*; *2198*; *2199*; *2200*; *2201*; *2202*; *2203*; *2204*; *2205*; *2206*; *2207*; *2208*; *2209*; *2210*; *2211*; *2212*; *2213*; *2214*; *2215*; *2216*; *2217*; *2218*; *2219*; *2220*; *2221*; *2222*; *2223*; *2224*; *2225*; *2226*; *2227*; *2228*; *2229*; *2230*; *2231*; *2232*; *2233*; *2234*; *2235*; *2236*; *2237*; *2238*; *2239*; *2240*; *2241*; *2242*; *2243*; *2244*; *2245*; *2246*; *2247*; *2248*; *2249*; *2250*; *2251*; *2252*; *2253*; *2254*; *2255*; *2256*; *2257*; *2258*; *2259*; *2260*; *2261*; *2262*; *2263*; *2264*; *2265*; *2266*; *2267*; *2268*; *2269*; *2270*; *2271*; *2272*; *2273*; *2274*; *2275*; *2276*; *2277*; *2278*; *2279*; *2280*; *2281*; *2282*; *2283*; *2284*; *2285*; *2286*; *2287*; *2288*; *2289*; *2290*; *2291*; *2292*; *2293*; *2294*; *2295*; *2296*; *2297*; *2298*; *2299*; *2300*; *2301*; *2302*; *2303*; *2304*; *2305*; *2306*; *2307*; *2308*; *2309*; *2310*; *2311*; *2312*; *2313*; *2314*; *2315*; *2316*; *2317*; *2318*; *2319*; *2320*; *2321*; *2322*; *2323*; *2324*; *2325*; *2326*; *2327*; *2328*; *2329*; *2330*; *2331*; *2332*; *2333*; *2334*; *2335*; *2336*; *2337*; *2338*; *2339*; *2340*; *2341*; *2342*; *2343*; *2344*; *2345*; *2346*; *2347*; *2348*; *2349*; *2350*; *2351*; *2352*; *2353*; *2354*; *2355*; *2356*; *2357*; *2358*; *2359*; *2360*; *2361*; *2362*; *2363*; *2364*; *2365*; *2366*; *2367*; *2368*; *2369*; *2370*; *2371*; *2372*; *2373*; *2374*; *2375*; *2376*; *2377*; *2378*; *2379*; *2380*; *2381*; *2382*; *2383*; *2384*; *2385*; *2386*; *2387*; *2388*; *2389*; *2390*; *2391*; *2392*; *2393*; *2394*; *2395*; *2396*; *2397*; *2398*; *2399*; *2400*; *2401*; *2402*; *2403*; *2404*; *2405*; *2406*; *2407*; *2408*; *2409*; *2410*; *2411*; *2412*; *2413*; *2414*; *2415*; *2416*; *2417*; *2418*; *2419*; *2420*; *2421*; *2422*; *2423*; *2424*; *2425*; *2426*; *2427*; *2428*; *2429*; *2430*; *2431*; *2432*; *2433*; *2434*; *2435*; *2436*; *2437*; *2438*; *2439*; *2440*; *2441*; *2442*; *2443*; *2444*; *2445*; *2446*; *2447*; *2448*; *2449*; *2450*; *2451*; *2452*; *2453*; *2454*; *2455*; *2456*; *2457*; *2458*; *2459*; *2460*; *2461*; *2462*; *2463*; *2464*; *2465*; *2466*; *2467*; *2468*; *2469*; *2470*; *2471*; *2472*; *2473*; *2474*; *2475*; *2476*; *2477*; *2478*; *2479*; *2480*; *2481*; *2482*; *2483*; *2484*; *2485*; *2486*; *2487*; *2488*; *2489*; *2490*; *2491*; *2492*; *2493*; *2494*; *2495*; *2496*; *2497*; *2498*; *2499*; *2500*; *2501*; *2502*; *2503*; *2504*; *2505*; *2506*; *2507*; *2508*; *2509*; *2510*; *2511*; *2512*; *2513*; *2514*; *2515*; *2516*; *2517*; *2518*; *2519*; *2520*; *2521*; *2522*; *2523*; *2524*; *2525*; *2526*; *2527*; *2528*; *2529*; *2530*; *2531*; *2532*; *2533*; *2534*; *2535*; *2536*; *2537*; *2538*; *2539*; *2540*; *2541*; *2542*; *2543*; *2544*; *2545*; *2546*; *2547*; *2548*; *2549*; *2550*; *2551*; *2552*; *2553*; *2554*; *2555*; *2556*; *2557*; *2558*; *2559*; *2560*; *2561*; *2562*; *2563*; *2564*; *2565*; *2566*; *2567*; *2568*; *2569*; *2570*; *2571*; *2572*; *2573*; *2574*; *2575*; *2576*; *2577*; *2578*; *2579*; *2580*; *2581*; *2582*; *2583*; *2584*; *2585*; *2586*; *2587*; *2588*; *2589*; *2590*; *2591*; *2592*; *2593*; *2594*; *2595*; *2596*; *2597*; *2598*; *2599*; *2600*; *2601*; *2602*; *2603*; *2604*; *2605*; *2606*; *2607*; *2608*; *2609*; *2610*; *2611*; *2612*; *2613*; *2614*; *2615*; *2616*; *2617*; *2618*; *2619*; *2620*; *2621*; *2622*; *2623*; *2624*; *2625*; *2626*; *2627*; *2628*; *2629*; *2630*; *2631*; *2632*; *2633*; *2634*; *2635*; *2636*; *2637*; *2638*; *2639*; *2640*; *2641*; *2642*; *2643*; *2644*; *2645*; *2646*; *2647*; *2648*; *2649*; *2650*; *2651*; *2652*; *2653*; *2654*; *2655*; *2656*; *2657*; *2658*; *2659*; *2660*; *2661*; *2662*; *2663*; *2664*; *2665*; *2666*; *2667*; *2668*; *2669*; *2670*; *2671*; *2672*; *2673*; *2674*; *2675*; *2676*; *2677*; *2678*; *2679*; *2680*; *2681*; *2682*; *2683*; *2684*; *2685*; *2686*; *2687*; *2688*; *2689*; *2690*; *2691*; *2692*; *2693*; *2694*; *2695*; *2696*; *2697*; *2698*; *2699*; *2700*; *2701*; *2702*; *2703*; *2704*; *2705*; *2706*; *2707*; *2708*; *2709*; *2710*; *2711*; *2712*; *2713*; *2714*; *2715*; *2716*; *2717*; *2718*; *2719*; *2720*; *2721*; *2722*; *2723*; *2724*; *2725*; *2726*; *2727*; *2728*; *2729*; *2730*; *2731*; *2732*; *2733*; *2734*; *2735*; *2736*; *2737*; *2738*; *2739*; *2740*; *2741*; *2742*; *2743*; *2744*; *2745*; *2746*; *2747*; *2748*; *2749*; *2750*; *2751*; *2752*; *2753*; *2754*; *2755*; *2756*; *2757*; *2758*; *2759*; *2760*; *2761*; *2762*; *2763*; *2764*; *2765*; *2766*; *2767*; *2768*; *2769*; *2770*; *2771*; *2772*; *2773*; *2774*; *2775*; *2776*; *2777*; *2778*; *2779*; *2780*; *2781*; *2782*; *2783*; *2784*; *2785*; *2786*; *2787*; *2788*; *2789*; *2790*; *2791*; *2792*; *2793*; *2794*; *2795*; *2796*; *2797*; *2798*; *2799*; *2800*; *2801*; *2802*; *2803*; *2804*; *2805*; *2806*; *2807*; *2808*; *2809*; *2810*; *2811*; *2812*; *2813*; *2814*; *2815*; *2816*; *2817*; *2818*; *2819*; *2820*; *2821*; *2822*; *2823*; *2824*; *2825*; *2826*; *2827*; *2828*; *2829*; *2830*; *2831*; *2832*; *2833*; *2834*; *2835*; *2836*; *2837*; *2838*; *2839*; *2840*; *2841*; *2842*; *2843*; *2844*; *2845*; *2846*; *2847*; *2848*; *2849*; *2850*; *2851*; *2852*; *2853*; *2854*; *2855*; *2856*; *2857*; *2858*; *2859*; *2860*; *2861*; *2862*; *2863*; *2864*; *2865*; *2866*; *2867*; *2868*; *2869*; *2870*; *2871*; *2872*; *2873*; *2874*; *2875*; *2876*; *2877*; *2878*; *2879*; *2880*; *2881*; *2882*; *2883*; *2884*; *2885*; *2886*; *2887*; *2888*; *2889*; *2890*; *2891*; *2892*; *2893*; *2894*; *2895*; *2896*; *2897*; *2898*; *2899*; *2900*; *2901*; *2902*; *2903*; *2904*; *2905*; *2906*; *2907*; *2908*; *2909*; *2910*; *2911*; *2912*; *2913*; *2914*; *2915*; *2916*; *2917*; *2918*; *2919*; *2920*; *2921*; *2922*; *2923*; *2924*; *2925*; *2926*; *2927*; *2928*; *2929*; *2930*; *2931*; *2932*; *2933*; *2934*; *2935*; *2936*; *2937*; *2938*; *2939*; *2940*; *2941*; *2942*; *2943*; *2944*; *2945*; *2946*; *2947*; *2948*; *2949*; *2950*; *2951*; *2952*; *2953*; *2954*; *2955*; *2956*; *2957*; *2958*; *2959*; *2960*; *2961*; *2962*; *2963*; *2964*; *2965*; *2966*; *2967*; *2968*; *2969*; *2970*; *2971*; *2972*; *2973*; *2974*; *2975*; *2976*; *2977*; *2978*; *2979*; *2980*; *2981*; *2982*; *2983*; *2984*; *2985*; *2986*; *2987*; *2988*; *2989*; *2990*; *2991*; *2992*; *2993*; *2994*; *2995*; *2996*; *2997*; *2998*; *2999*; *3000*; *3001*; *3002*; *3003*; *3004*; *3005*; *3006*; *3007*; *3008*; *3009*; *3010*; *3011*; *3012*; *3013*; *3014*; *3015*; *3016*; *3017*; *3018*; *3019*; *3020*; *3021*; *3022*; *3023*; *3024*; *3025*; *3026*; *3027*; *3028*; *3029*; *3030*; *3031*; *3032*; *3033*; *3034*; *3035*; *3036*; *3037*; *3038*; *3039*; *3040*; *3041*; *3042*; *3043*; *3044*; *3045*; *3046*; *3047*; *3048*; *3049*; *3050*; *3051*; *3052*; *3053*; *3054*; *3055*; *3056*; *3057*; *3058*; *3059*; *3060*; *3061*; *3062*; *3063*; *3064*; *3065*; *3066*; *3067*; *3068*; *3069*; *3070*; *3071*; *3072*; *3073*; *3074*; *3075*; *3076*; *3077*; *3078*; *3079*; *3080*; *3081*; *3082*; *3083*; *3084*; *3085*; *3086</*

jury. The refused instruction which in effect directed a verdict unless the appellee had proved by a preponderance of the evidence that he had provided a sufficient draft for the use and operation of a No. 58 furnace was properly refused.

We find no reversible error in the matters presented for review, and the judgment is therefore affirmed.

Judgment affirmed.

Two reasons are given which in effect directed
the United States to be moved by a proposition of the
advice that he had provided a sufficient brief for the use and
petition of No. 23. The reasons were, roughly stated,
We find no reversible or in the matter presented for
review, and the judgment is therefore affirmed.
Judgment affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6569

4320

211 I.A. 654

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

~~Hon.~~ JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6569

Thomas A. Farrell, appellee

vs

Appeal from Knox.

Money Almgren and F. O. Munson

appellants.

Nichols, J.

In this case the appellee, Thomas A. Farrell, sued the appellants Money Almgren and F. O. Munson in the circuit court of Knox County, to recover for commissions which he claimed were due him under a contract with appellants, by which the appellants agreed to pay the appellee, if he would find a purchaser for their farm of 153 acres, all the purchaser would give for the farm above \$100 an acre; and it was claimed that the appellee found a purchaser, who was ready able and willing to buy the farm in question for \$105 per acre. There was a trial by jury, and a verdict and judgment in favor of the appellee for \$765 which was \$5 per acre for 153 acres, from which judgment this appeal is prosecuted.

The proof shows that the appellee made a contract with the appellants by which he was to act for them, as their agent, to sell the land in question. The fact of agency is not disputed; nor is there any serious conflict in the evidence as to the amount of commissions which the appellee was entitled to receive from the appellants, in case he procured a purchaser who would buy the land from them, namely all that the purchaser would be willing to pay for the land over \$100 per acre. It is also clear from the proof, that the appellee found a purchaser who wanted to purchase the land; and who was able ready and willing to do so; and in fact had made arrangements for the purchase of the land at \$105 per acre. The appellee testified, that on Saturday evening October 6, 1917, he informed one of the appellants Money Almgren

Thomas A. Farnell, appellee

Appel from Knox.

vs

Money Almgren and T. O. Hanson

appellants.

Filed Aug. 3.

In this case the appellee, Thomas A. Farnell, sued the appellants Money Almgren and T. O. Hanson in the circuit court of Stark County, to recover for obligations which he claimed were due him under a contract with appellants, by which the appellants agreed to pay the appellee, if he would find a purchaser for their farm of 153 acres, all the purchaser would give for the farm above \$100 an acre; and it was alleged that the appellee found a purchaser, who was ready, able and willing to pay the farm in question for \$100 per acre. There was a trial by jury, and a verdict and judgment in favor of the appellee for \$785 which was 15 per acre for 153 acres, from which judgment this appeal is prosecuted. The record shows that the appellee made a contract with the appellants by which he was to act for them, as their agent, to sell the land in question. The fact of agency is not disputed; nor is there any serious conflict in the evidence as to the amount of obligations which the appellee was entitled to receive from the appellants, in case he procured a purchaser who would pay the land from them, namely all that the purchaser would be willing to pay for the land over \$100 per acre. It is also clear from the record, that the appellee found a purchaser who wanted to purchase the land; and who was ready and willing to do so; and in fact had made arrangements for the purchase of the land at \$100 per acre. The appellee testified, that on Saturday evening October 6, 1917, he informed one of the appellants Money Almgren

that he had secured a purchaser for the land. The next day after he had received the information testified to by the appellee, which was Sunday, the appellee Almgren entered into articles of agreement with Munson, the other appellant, for the purchase of Munson's interest in the farm in question; and thereupon when the appellee appeared upon the scene the next day with this purchaser, he was informed by Almgren, that he was too late; that Almgren had bought the place himself. And appellants claim, that it was a part of the agreement made with appellee concerning the sale of the farm, their right to sell and handle the farm themselves be reserved to them and in case the appellants sold the farm themselves, appellee was to have no commissions. The appellee denied, that the appellants reserved the right to sell or handle the matter of the sale themselves; but assuming that the reservation claimed by the appellants, was actually a part of the terms of the contract, can the transfer of the undivided one half interest in the farm by one of the appellants to the other, be legally construed as a sale of the farm as contemplated by the alleged reservation? It is evident that the trial court construed the contract to mean that selling or handling the matter of the sale of the land themselves did not mean the selling of an interest in the land by one appellant to the other; that it had reference to the sale of the farm and not any interest in it; and to a purchaser who would purchase the entire farm and the interest of both of the appellants. We are of opinion that the trial court correctly construed the contract in question. The selling or handling of this farm must be construed to have reference to the same matter concerning which they employed the appellee as agent, which was to find some one who would purchase the farm from them. Moreover, after the transfer of the interest by Munson to Almgren who was bound by the contract

made with appellee, as well as Munson, he was in a better position than before, to sell the farm to the purchaser found by appellee, and could ~~only~~ not by a refusal to sell deprive appellee of his right to the commission.

It is also urged by the appellants that the evidence does not sufficiently show that the purchaser who was ready, was also able to purchase the farm; and that in addition to the proof, that the purchaser had made arrangements with George A. Lawrence to borrow money to pay for the land, there should have been evidence offered to show the financial standing of George A. Lawrence, and his ability to furnish the money. We do not think that this proof was necessary; especially in view of the ~~fact~~ testimony of the purchaser, that he had the money to pay for the place; which testimony was not contradicted, nor discredited in any way. Complaint is made concerning the giving of certain instructions for the appellee, and also of the refusal of certain instructions offered by the appellants. If the trial court was right in its construction of the contract under which the appellee claimed commission, in holding that the transfer of the interest of one appellant to the other in the land did not affect the appellee's right to the commission, then there was no error in the given instructions; and the instructions requested by the appellants were properly refused; the court's construction of the contract we hold was right. We find no error in the admission or rejection of evidence during the trial. The record does not disclose any error, for which the judgment should be reversed; it is therefore affirmed.

Judgment affirmed.

with capital, as well as labor, he was in a better position
to sell the land to the purchaser than by himself.
It could not be a violation to sell the land of his
right to the corporation.

It is also noted by the appellants that the evidence does not
sufficiently show that the purchaser who was ready, was also able
to purchase the land; and that in addition to the proof, that
the purchaser had made arrangements with George A. Lawrence to
borrow money to pay for the land, there should have been evidence
offered to show the financial standing of George A. Lawrence,
and his ability to furnish the money. We do not think that this
proof was necessary; especially in view of the fact that the
purchaser, that he had the money to pay for the land; which
testimony was not contradicted, nor attacked in any way. Con-
sidering the evidence concerning the giving of certain instructions
on the subject, and the refusal of the refusal of certain instructions
offered by the appellants. If the trial court was right in its

construction of the contract under which the appellee claimed
commission, in holding that the transfer of the interest of one
appellant to the other in the land did not affect the other's
right to the commission, then there was no error in the given
instructions; and the instructions requested by the appellants
were properly refused; the court's construction of the contract
is held with right. We find no error in the instruction or refu-
sion of evidence with the trial. The record does not disclose
any error, and the judgment should be reversed; it is

Reversed and affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



6582

4322

211 I.A. 659

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April,
in the year of our Lord one thousand nine hundred and eight-
een, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

JUL 25 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

(111)

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Modern Woodmen of America, Appeller,
-vs- Appeal from Circuit Court
Kane County.
Julia A. Binder, Appellant.

Niehaus, J.

In this case the appellee, Modern Woodmen of America, filed a bill in equity in the circuit court of Kane county against Julia A. Binder, appellant, and her agents and attorneys, to enjoin the collection of a judgment obtained in the same court by the appellant against the appellee. The facts relied upon by the appellee as a basis for the relief sought are set up in the amended bill. The appellant filed a general demurrer to the amended bill, which was overruled by the court, and the appellant abided by her demurrer, and thereupon the court decreed the relief prayed for. The appellee is a fraternal beneficiary society organized under the laws of this state, and issues benefit certificates of life indemnity to its members. The salient features of its amended bill upon which it bases its prayer for relief are as follows:- That on or about September 3, 1888, a benefit certificate was issued to one George Binder, then of Earlville, Illinois, for the sum of \$3000, payable at his death to his wife, Julia Binder; that in May 1914, said Julia Binder, who is the appellant, commenced suit against the appellee to recover the amount due under said benefit certificate, alleging the death of her husband, George binder. The facts constituting her right to recover as stated in the declaration filed in that case were that she was the wife of George Binder, and that said George

-v-

Applicant, John A. Binder,
Respondent, John A. Binder.

Applicant.

Page 1.

In this case the applicant, John A. Binder, filed a bill to equity in the circuit court of Kane county, against John A. Binder, respondent, and her agents and attorneys, to obtain the collection of a judgment obtained in the same court by the applicant against the respondent. The facts related in the bill are as follows: That on or about September 1, 1888, a benefit certificate was issued to one George Binder, then of Riville, Illinois, for the sum of \$5000, payable at his death to his wife, Julia Binder; that in May 1914, said Julia Binder, in the applicant's name, commenced suit against the respondent to recover the amount due under said benefit certificate, alleging the death of her husband, George Binder. The facts constituting the right to recover are stated in the declaration filed in this case and that she was the wife of George Binder, and that said George

Binder had been absent and not heard from for more than seven years; and that she has made diligent inquiry concerning him among his relatives, friends and neighbors, and from all other people who might be presumed to know or hear from him; and that from all such search and inquiry she was unable to find him, or learn, that he was alive at any time during said period of seven years, and that from such facts he was then presumed to be dead; that she had presented proofs of his death to the appellee, and that the appellee was indebted to her in the sum of \$5000, the amount of said benefit certificate, and interest. That this appellant's action at law which was based upon the presumptive death of George Binder, was tried in the circuit court of Kane county; and the court found that said George Binder was dead, and that the appellant as his widow was entitled to recover the amount of said benefit certificate and interest, namely, \$3462.50, and on January 13, 1917, rendered a judgment on this finding against the appellee. It is also alleged in the amended bill that during the month of September, 1913, when the appellant first filed her claim under the benefit certificate, she filed with said claim a statement that said George Binder had disappeared; that he had been unheard from for upwards of seven years; that he was last heard from at Argentine, Kansas, on Christmas Day, 1905, and that he was presumed to be dead from the fact of his unexplained absence; that the appellee thereupon instituted an investigation to ascertain the truth of the claim made by the appellant and to find out whether said George Binder was living, and that an agent of appellee in October 1913, called upon appellant at her residence in Chicago and made inquiries of her as to what she knew concerning her husband. That in the conversation had at that time the appellant informed appellee's agent

that her husband had been a carpenter; that he had left Earlville in January, 1903; that she heard from him within two or three months thereafter from Mountain Park, Oklahoma; that thereafter he had been heard from in Newton, Kansas, and that after that she had received word from him Christmas Day 1905; that at that time he was in Argentine, Kansas, working as a carpenter for the Sante Fe Railroad, in the building of a station, but had not been heard from since. That after obtaining the information mentioned from the appellant, the appellee ascertained the name and address of the superintendent of the division of the Sante Fe Railroad, which includes the town of Argentine, Kansas, and then wrote to the superintendent to ascertain the name of the contractor who erected the station at Argentine, and inquired of the superintendent for the names of the person who had hired said George Binder, and for the names of the persons who had worked with said George Binder at Argentine, stating also that it was claimed that said George Binder had been gone for seven years and that a presumption of his death arose from such absence; that on November 4, 1913, appellee received a reply to its letter from the chief engineer ^{of} ~~in~~ the Sante Fe Railroad stating that said station at Argentine was built in 1906 and had not been started in 1905; that thereupon the appellee wrote to said chief engineer asking for the name of the contractor who built said Argentine station in 1906, and asked if any work had been done on said Sante Fe Railroad at Argentine in the year 1905; that it also wrote to the appellant stating the information it has received from the chief engineer of the Sante Fe Railroad, but received no reply from appellant; but on November 11, 1913, received a letter from the chief engineer of the Sante Fe Railroad giving the name and address of the person who built the Argentine

that her husband had been a carpenter; that he had left Knoxville in January, 1903; that she heard from him within two or three months thereafter from Mount Park, Oklahoma; that thereafter he had been heard from in Newton, Kansas, and that after that she had received word from him Christmas Day 1905; that at that time he was in Argentine, Kansas, working as a carpenter for the Santa Fe Railroad, in the building of a station, but had not been heard from since. In order to obtain the information mentioned from the Santa Fe Railroad, the Special Agent obtained the name and address of the Superintendent of the division of the Santa Fe Railroad, which included the town of Argentine, Kansas, and then wrote to the Superintendent to ascertain the name of the contractor who erected the station at Argentine, and inquired of the Superintendent for the name of the person who had hired said George Hinder, and for the name of the person who had worked with said George Hinder at Argentine, stating also that it was claimed that said George Hinder had been paid for seven years and that a presumption of his death arose from such payment; that on November 6, 1913, Argentine received a reply to its letter from the chief engineer of the Santa Fe Railroad stating that said station at Argentine was built in 1906 and had not been started in 1905; that thereafter the Special Agent wrote to said chief engineer asking for the name of the contractor who built said Argentine station in 1906, and asked if any work had been done on said station at Argentine in the year 1905; that it was also asked to the Special Agent the information that was received from the chief engineer of the Santa Fe Railroad, that received no reply from Argentine; and on November 11, 1913, was sent a letter from the chief engineer of the Santa Fe Railroad giving the name and address of the person who built the Argentine

station; and thereupon it wrote to the person named stating that it desired to locate George Binder; that it was claimed that he had been working on said station; that it would like to learn whether said George Binder worked at Argentine, and to get the names and addresses of other men employed at said time and place, and to receive any information concerning said George Binder; and also, that it was claimed that said George Binder had not been heard from for seven years, upon the basis of which a claim had been made against the appellee, for the proceeds of a policy issued by the appellee to said George Binder; that the appellee in writing said last mentioned letter enclosed a self-addressed stamped envelope for reply, but never received any reply; that appellee never received any other information concerning the location of said George Binder, nor any clue that would enable it to make any further investigation concerning appellant's claim, or to indicate the fact that said George Binder might be living, and never received any further or additional information from appellant that would have enabled appellee to carry on any further investigation prior to the entry of the judgment in question. But after the said judgment had been obtained, namely, on or about February 1, 1917, the appellee accidentally obtained information to the effect that said George Binder was then still alive in the State of Oklahoma, and had been there recently seen; that this information was contained in a newspaper article published in Earlville, Illinois, which recited the fact that one W.B. Robinson, of Earlville, had recently seen said George Binder in the State of Oklahoma; that the appellee thereupon immediately tried to call said W.B. Robinson over the long distance telephone, but was informed that said W.B. Robinson had left Earlville, and had probably gone to the State of

action; and therefore it was the person who was asked to
 it down to look for the person; that it was claimed that he
 had been working on this person; that it was claimed that he
 whether this person might be a person, and in fact the
 cases and addresses of other persons who were in the same
 and to resolve any information concerning this person; and
 also, that it was claimed that this person was in the same
 heard from last year, when the name of which a claim
 had been made against the person, for the purpose of a policy
 issued by the person to which the person was; that the person
 in writing, and that person had been employed as a self-employed
 stopped envelope for reply, but never received any reply; that
 and has never received any other information concerning the in-
 cation of this person, nor any claim that would enable it to
 must say further investigation now being conducted, and
 to indicate the fact that this person might be living, and
 never received any other or additional information from person
 that would be enabled to make it any other person's
 then prior to the entry of the person in question. But after the
 his judgment has been obtained, and on about February 1, 1917,
 the person actually obtained information in the fact that
 with George Lindy and that all five in the state of Illinois,
 and had been there recently; that this information was con-
 tained in a newspaper article published in Chicago, Illinois,
 which stated the fact that one person, at Chicago, had
 recently been seen. George Lindy in the state of Illinois; that
 the person therefore had only been in the state of Illinois
 over the long distance telephone, and was located in the state of
 Illinois and last night, and had probably been in the state of

Georgia; that thereafter on February 12, 1917, appellee caused an investigation to be made at Earlville concerning the report of said W.B. Robinson that said George Binder was still alive, and from said investigation appellee learned that said W.B. Robinson had informed several persons that he had seen George Binder in Oklahoma in the month of December, 1916; that appellee endeavored to communicate with said W. B. Robinson but was unable to do so until April 12, 1917, at which time said Robinson was again in Earlville, and appellee interviewed him at that time, and thereupon learned definitely for the first time that said George Binder was living and in robust health and had been seen and talked with by the said W.B. Robinson in the State of Oklahoma in December 1916. It is also alleged in the amended bill that said George Binder obtained a decree of divorce in an action against said Julia Binder in the district of Okmulgee County, Oklahoma, January 9, 1915, and that said decree was entered by Hon. Wade S. Stanfield, Judge of said district court in and for said Okmulgee County, Oklahoma, and that said cause in which said decree was entered was commenced on September 23, 1914, and was known as Calendar Number 3421. It is also alleged in said amended bill that the appellant first learned the location and address of said George Binder from the testimony of W.B. Robinson given in open court on the date when the original application in this cause was filed, and that appellee was unable to ascertain the location of said George Binder prior to that time and that it immediately instituted an investigation in the city of Okmulgee, Oklahoma; that appellee at that time had no knowledge, information or belief that said George Binder had obtained a divorce from Julia Binder, but surmised that a divorce might possibly have been obtained by said George Binder, and therefore investigated the court records at Okmulgee to ascertain the

[illegible]

fact; that appellee first learned on April 30, 1917, concerning said action of said George Binder for a divorce, and the result thereof; that said George Binder is now living and a resident of the city of Okmulgee, Oklahoma. It is clear from the averments of the amended bill, which must be taken as true, that George Binder was alive at the time of the rendition of the judgment complained of, and that the judgment was the result of accident and mistake, and that the right of third persons have not in any way intervened. The right to relief in a court of equity against a judgment which is the result of accident or mistake is fully established. Miller v. Barto, 247 Ill. 104; Hilt v. Heimberger, 235 Ill. 235; Holmes v. Stateler, 57 Ill. 209. Courts of Equity, however, will not grant the relief prayed for if the complaining party had opportunity to make his defense at law to the judgment and had neglected to do so. Martin V. McCall, 247 Ill. 484.

And it is contended by the appellant that the appellee was negligent in not sooner ascertaining the facts alleged in the amended bill; and that by the exercise of proper diligence it could have ascertained that George Binder was alive before the trial of the law case, and that therefore it has no standing in a court of equity. We cannot agree with the appellant in this contention. Taking the averments of the amended bill as true it is not apparent how the appellee, from the information which it was able to gather concerning George Binder, could have expected to locate him as living in Okmulgee, Oklahoma, by any reasonable diligence or search. It must be remembered that appellant was George Binder's wife, and therefore most intimately related to him. and

...; the appellant first learned on April 30, 1914, concerning
and action of said George Binder for a divorce, and the result
...; that said George Binder is now living and is residing
in the city of Oklahoma, Oklahoma. It is clear from the averments
in the amended bill, which must be taken as true, that George
Binder was alive at the time of the rendition of the judgment
...; and that the judgment was the result of a competent
and valid trial, and that the right of third persons have not in any
way intervened. The right to relief in a court of equity against
judgments which is the result of accident or mistake is fully
recognized. Miller v. Barte, 207 Ill. 101; Hill v. Harrison,
35 Ill. 335; Nelson v. Stetson, 37 Ill. 309. Courts of equity,
however, will not grant the relief prayed for in the accompanying
petition and opportunity to make his defense or law to the judgment
and had suggested to do so. Martin v. Kohn, 207 Ill. 42.
It is contended by the appellant that the appellant was negligent
in not sooner asserting the facts alleged in the amended bill;
that by the exercise of proper diligence it could have ascer-
tained that George Binder was alive before the trial of the law
...; and that therefore it was so standing in a court of equity,
and cannot agree with the appellant in this contention. Being
...; the amended bill as true it is not apparent how
on appeal, from the information which it was able to gather
concerning George Binder, could have expected to locate him as
living in Oklahoma, Oklahoma, or any reasonable diligence re-
spected. It must be remembered that appellant was George Binder's
...; and therefore most intimately related to him and

had lived with him up to the time of his departure, and would naturally therefore have more knowledge concerning him, and his whereabouts, as well as concerning his family connections, and friends and acquaintances and other intimates who might have knowledge concerning his whereabouts. She was in the best position to get results from any search or inquiry that might be made concerning him, and her suit for recovery upon the benefit certificate in question was based upon the fact alleged by her that she made diligent search and inquiry to ascertain whether her husband was still living, and that such search and inquiry were fruitless; and that therefore her husband must be presumed to be dead. The appellant is hardly in position to say that the appellee could have ascertained the fact that George Binder was still living at the time of the trial of the suit at law, when the wife acting under conditions more favorable than the appellee could have acted under, was unable to ascertain the fact. It could not be expected of the appellee that it re-make the investigations and search made by appellant; but he had a right to accept these, and appellant is not in position to assert that they were not made with diligence or that anything was neglected in trying to find out whether her husband was still living. But it appears that the appellee nevertheless did make further investigation which, while it did not bring the information which it sought for, nevertheless relieves the appellee of the charges made by appellant of neglecting to ascertain its defense in the suit at law. The discovery that George Binder was living and a resident of Oklahoma according to the allegations of the amended bill was purely accidental and came to appellee after the judgment had been obtained, and it is not apparent that any amount of diligence or search would have gained this information

for the appellee before the time of the entry of the judgment. In *Holmes v. Statelet*, *supra*, the court expressly holds that where a party seeking after making every effort in his power to discover evidence and fails, upon the evidence being afterwards discovered courts of equity will treat this as an accident. For the reasons stated we are of opinion that the averments in the amended bill are sufficient to entitle the appellee to the relief prayed for and that the demurrer was properly overruled. The decree is therefore affirmed.

Decree affirmed.

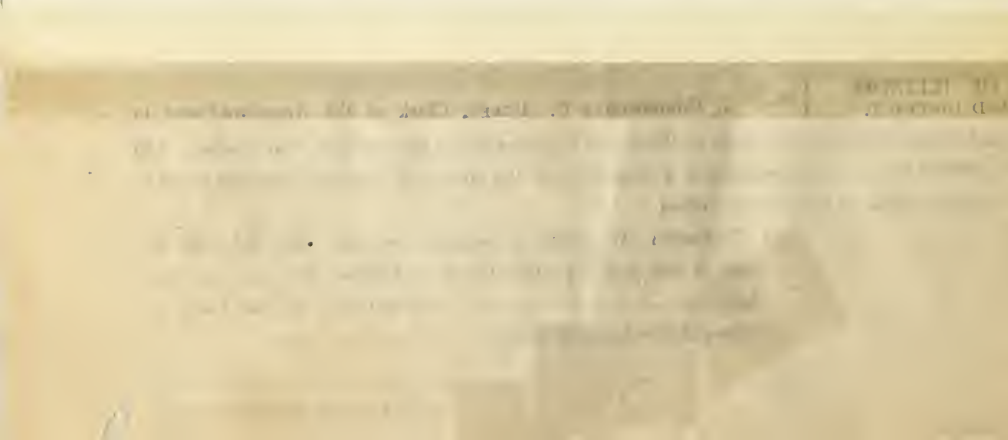
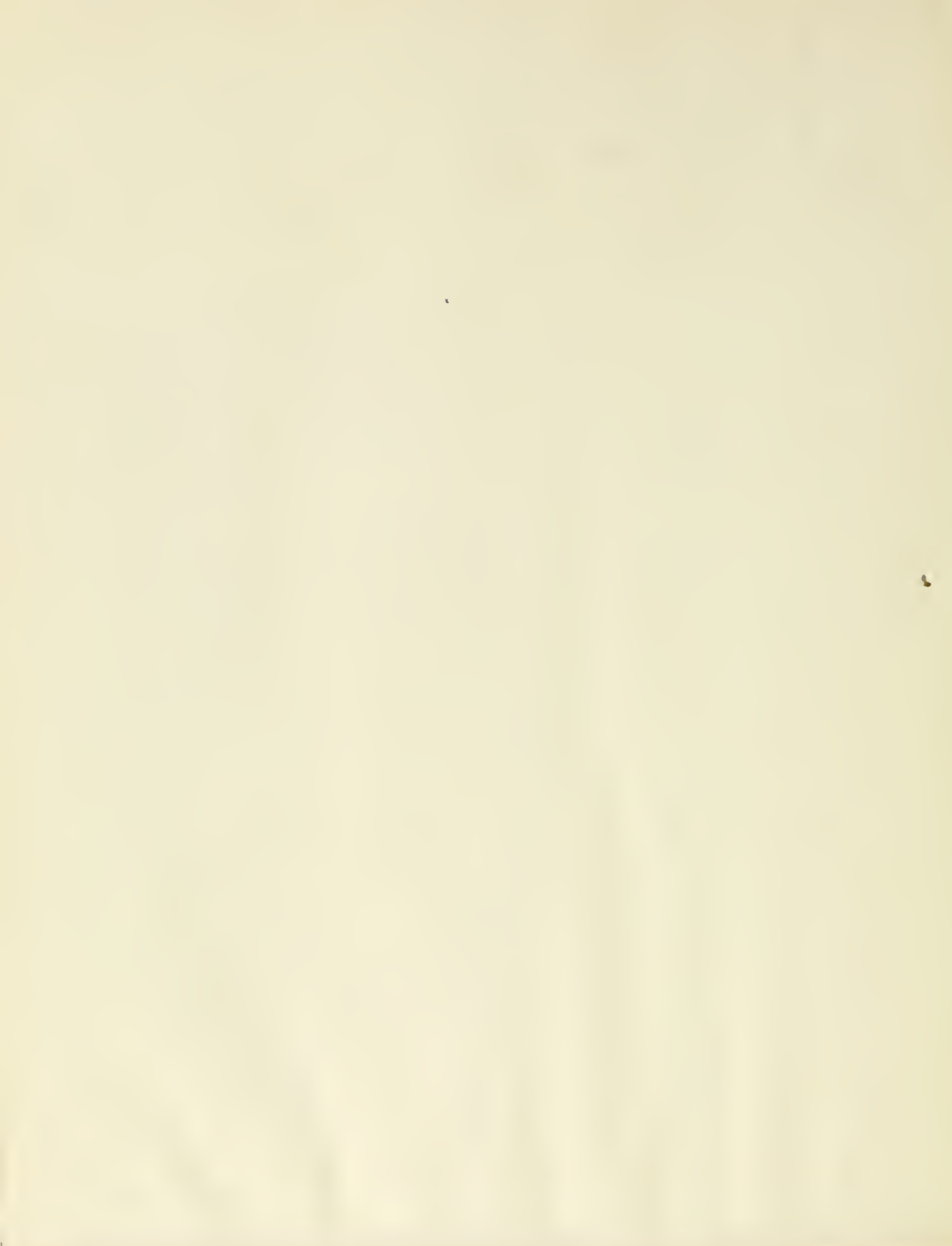
for and that the document was found overruled. The document is therefore void.

075-5

STATE OF ILLINOIS, } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in
SECOND DISTRICT. }
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO
HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



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